

DISCOVERY MATTER

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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

KENO V. THOMAS,

Plaintiff,

v.

STARZ ENTERTAINMENT, LLC;
MICHAEL THORNTON; and DOES 1
through 10, inclusive,

Defendants.

Case No.: CV15-09239 CAS (AFMx)

[Assigned to the Honorable Christina A.
Snyder – Courtroom 8D]

**JOINT DISCOVERY STIPULATION
COMPELLING PRODUCTION OF
DOCUMENTS OR, IN THE
ALTERNATIVE, FOR PROTECTIVE
ORDER**

Date: April 4, 2017
Time: 10:00 a.m.
Crtrm: H

**MATTER FOR DETERMINATION BY
THE HONORABLE ALEXANDER F.
MACKINNON**

Complaint filed: October 29, 2015
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INTRODUCTORY STATEMENTS

I. Plaintiff's Introductory Statement

A. Issues Before the Court

This motion concerns two issues: (1) the parameters of ESI searches to implement Plaintiff's First Set of RFPs, and (2) the terms of a protective order. The Parties have met and conferred for two months on these issues but remain in dispute.

Following the exchange of numerous ESI proposals, Plaintiff sent Defendants his most recent ESI proposal on February 13, 2017. This proposal reduced the number of custodians by half and incorporated Defendants' request to break up broad ESI searches into a larger number of narrowly tailored searches focusing on discrete issues and specific custodians. Defendants have rejected Plaintiff's proposal but have provided no counterproposal or even a date certain by which one would be forthcoming. Moreover, even though Defendants have objected to all of Plaintiff's ESI requests as imposing an undue burden and not proportional to the needs of this case, they have provided none of the information Plaintiff has repeatedly requested, such as custodian-specific email counts, necessary to assess this objection. Defendants' strategy of slow-walking the meet and confer process and withholding critical information is not a good faith negotiation and has forced Plaintiff to seek relief from this Court.

The Parties have also been unable to reach an agreement as to the terms of a protective order for this case. While Plaintiff has agreed that some protective order may be entered in this case, he is unable to agree to Defendants' specific demand for a two-track designation scheme including an extremely restrictive "Highly Confidential" designation preventing counsel from sharing such documents with deposition witnesses or with Plaintiff himself. Defendants have failed to show good cause for imposing such a restrictive protective order in this employment case. Even though Plaintiff served his RFPs more than two months ago, Defendants refuse to identify the documents they wish to designate, preferring to leave themselves the latitude to apply the Highly Confidential designation however they choose. Finally, Defendants have resisted all reasonable

1 compromises aimed at mitigating the likely disruption this designation would have on
 2 this case. Accordingly, Plaintiff seeks a Court order setting a more reasonable protective
 3 order in this case.

4 **B. Factual Background**

5 As more fully set forth in the Second Amended Complaint (Ex. 25), this action
 6 arises from the unlawful retaliatory termination of Plaintiff Keno Thomas, a then-fifty-
 7 eight-year-old African-American man with more than thirty years of experience in the
 8 cable and satellite television industry. Mr. Thomas joined Defendant Starz in 2004 as its
 9 Senior Vice President of Sales and Affiliate Marketing, and remained in this position
 10 until his unlawful termination in 2014 in retaliation for (1) refusing to falsify financial
 11 documents, (2) whistleblowing regarding unlawful conduct used to negotiate a major
 12 contract, and (3) his long-standing advocacy on behalf of women and minorities.

13 Mr. Thomas was an exemplary employee at Starz. During his tenure with the
 14 company, Mr. Thomas received only praise regarding his performance, always met or
 15 exceeded his performance standards and revenue goals, and was given management
 16 responsibility for Starz's best performing distributors, which accounted for nearly half
 17 (45%) of the company's total annual revenue. Then Michael Thornton became Mr.
 18 Thomas's direct supervisor in August 2013, and everything changed. Ex. 25 ¶¶ 14-18.
 19 Thornton Disapproves of Mr. Thomas's Advocacy on Behalf of Women and Minorities

20 From the beginning of his tenure with Starz and over the course of his ten years
 21 with the company, Mr. Thomas consistently used his position of authority to advocate
 22 for women and minority employees at Starz, which suffers from a severe lack of
 23 diversity. Specifically, Starz has a long history of racial discrimination against its
 24 minority employees, and an extreme lack of diversity within its management ranks.
 25 Shortly after becoming his supervisor, however, Thornton made clear his disapproval of
 26 Plaintiff's activities and the diverse nature of Plaintiff's team. Ex. 25 ¶¶ 19-23.

27 Mr. Thomas Speaks Out Concerning an Unlawful Major Contract at Starz

28 On April 28, 2014, Thornton announced at a lavish company dinner that he and

1 Gregory Maffei, who sits on Boards of Directors for Starz (as Chairman) and Charter
2 Communications, had extended Starz's carriage contract with Charter well ahead of
3 schedule and on highly favorable terms. As Thornton explained the mechanics of the
4 deal, Mr. Thomas understood that Maffei had used illegal tactics to ram through the
5 contract in a manner that went well beyond accepted tactics in high-stakes business
6 negotiations. Alarmed at what he had just heard, Mr. Thomas told Thornton that
7 Maffei's actions might be unlawful. As was Thornton's practice, however, he declined
8 to address the problem and threatened to fire Mr. Thomas for raising it. Mr. Thomas
9 subsequently blew the whistle to several other individuals. Ex. 25 ¶¶ 28-44, 48, 57.

10 Mr. Thomas Refuses an Order to Falsify Company Documents

11 In early 2014, during its negotiations with Starz over a new contract to replace the
12 one expiring on August 31, 2014, DirecTV began removing Starz from its marketing
13 packages. Mr. Thomas informed Thornton that this development would negatively
14 impact Starz's revenue. Thornton then directed Kara Tefft, Starz's Director of Finance,
15 to order Mr. Thomas to falsify revenue figures and subscriber numbers for presentation
16 to Starz's Board, which Tefft did at a meeting on September 4, 2014. At that meeting,
17 Tefft ordered Mr. Thomas to artificially inflate revenue and subscriber figures and
18 provide plausibly sounding explanations in a cash flow and budget impact analysis of
19 the DirecTV extension for the fourth quarter 2014 through fiscal year 2015. Tefft
20 explained that this fraud was necessary because Thornton and Starz's C.E.O. Chris
21 Albrecht were concerned that the "optics" of the company's financial and operational
22 performance "did not look good" and they desired to present a false picture of favorable
23 financial projections resulting from the DirecTV extension to the Starz Board. Mr.
24 Thomas refused the order, reasonably believing that Tefft's directive violated numerous
25 state and federal statutes. Ex. 25 ¶¶ 45-46, 54, 58-63.

26 Starz Retaliates Against Mr. Thomas

27 Following these events, Starz retaliated against Mr. Thomas and ultimately
28 terminated him on October 7, 2014, effective February 23, 2015. Ex. 25 ¶¶ 45-57, 64-73.

II. Defendants' Introductory Statement

This is a single-plaintiff employment case. Plaintiff claims that he was terminated in retaliation for raising several concerns to his supervisor between April 28 and September 4, 2014. Discovery should be routine. But Plaintiff wages discovery like war. Plaintiff asks this Court to compel ESI searches in 56 broad categories (which search for hundreds of different things by searching for this “OR” that “OR” the other thing), from 25 custodians over a seven-year period, resulting in a universe of more than 4.6 million documents. That is more discovery than the usual employment *class action*, even though this is just a single-plaintiff case. Then, Plaintiff seeks to trample on the fundamental privacy of third parties and the confidentiality rights of Defendant Starz Entertainment, LLC (“Starz”) by asking this Court to:

(1) modify the entirely standard protective order in this case in a way that would allow Plaintiff to disclose Starz’s trade secret information to competitors, affiliates, customers and, importantly, individuals who work for Starz’s competitors;

(2) compel third parties who work for Starz to turn over their personal phones and email accounts, with all of their personal contents—including private communications with friends and family members, personal pictures, and a whole host of sensitive information—under threat of being fired if they do not comply; and

(3) compel Starz to search over 4.6 million documents with terms so broad that they are unlikely to yield relevant documents and are disproportionate to the needs of this case, including for confidential personnel files and human resources correspondence for all of its employees with the first or last name “Thomas,” even if that information has nothing to do with plaintiff Keno Thomas or his claims.

First, Plaintiff asks that the Court modify the parties’ stipulated protective order to prevent Defendants from designating any material as “Highly Confidential.” Contrary to Plaintiff’s argument, however, such protective orders are commonplace. Plaintiff misrepresents the holdings of the out-of-state authorities on which he relies; indeed, two of the cases that Plaintiff cites as rejecting two-tier protective orders actually granted

1 them. Moreover, Plaintiff ignores Ninth Circuit authority that has repeatedly approved
2 of such orders. There is good cause for such an order here. Plaintiff seeks sweeping
3 discovery of Starz's most confidential business information, and he seeks to disclose it
4 to witnesses who could exploit it against Starz.

5 Second, Plaintiff has casually asked this Court to order Starz to seize and search
6 what Plaintiff euphemistically calls employees' "personal electronic devices" and email
7 accounts. That is an understated way of saying that Plaintiff wants this Court to order
8 the seizure of employees' iPhones, Androids and every other device that the employees
9 own. Those employees have not been served with any discovery requests, and they had
10 no opportunity to object. And even though Starz has no legal right to seize those
11 devices, Plaintiff asserts that Starz can fire the employees if they refuse (and, apparently,
12 must do so on pain of contempt of court).

13 This is ironic: attorneys that supposedly represent the interests of employees ask
14 this Court to set a precedent that employers may demand that the employee turn over
15 personal property, or else be fired. Perhaps unsurprisingly, Plaintiff buries this issue 30
16 pages deep into his motion. But make no mistake: Plaintiff seeks to invade fundamental
17 employee privacy interests and to destroy any meaningful limit on what can be deemed
18 within an employer's custody and control. There is no precedent for it, and the Court
19 should refuse to order Starz to do it.

20 Third, Plaintiff has rejected Starz's attempts to meet and confer about a sensible
21 search universe and search terms for electronically stored information, and instead seeks
22 to compel Starz to undertake an overbroad and non-responsive data collection of over
23 4.6 million documents from 25 custodians over 7 years, and to force it to use untested,
24 overbroad, and in some cases illogical search terms in its document review. Plaintiff's
25 terms seek a massive amount of confidential personnel information from Starz that has
26 nothing to do with this matter. For example, Plaintiff requests things as broad as
27 "Thomas" and "Report"—which would include any report ever requested or given by
28 anyone with the first or last name Thomas over a seven-year period.

1 Plaintiff asks the Court to compel discovery that is entirely disproportionate to the
2 parties' legitimate discovery interests. Notably, Plaintiff fails to cite any single-plaintiff
3 employment case that has ordered such sweeping ESI discovery. And for good reason.
4 Discovery must lead to the production of relevant information, and not be a fishing
5 expedition into a party's non-responsive archives or an opportunity to bury an opposing
6 party in discovery demands disproportionate to the issues presented.

7 Plaintiff has brought this motion in bad faith. Despite going through the motions
8 of meeting and conferring, Plaintiff has refused to protect Starz's trade secrets,
9 consistently sought electronic data collection and searches that are baselessly overbroad
10 and disproportionate, and casually demanded unprecedented seizure and search of Starz
11 employee's own personal devices. Defendants have repeatedly attempted to reach some
12 reasonable compromise to avoid judicial intervention. In the face of unreasonable
13 custodian requests and unreasonable time frames that would have yielded a search
14 universe of over 4.6 million documents, Defendants have gone so far as to agree to
15 collect files from 15 custodians and run modified versions of many of Plaintiff's search
16 terms across a still-massive universe of more than *a million documents*. Defendants bent
17 over backwards to demonstrate their positions to Plaintiff and to avoid involving the
18 Court. Yet Plaintiff rejected all of Defendants' proposals, cut short meet and confer
19 efforts, and brought this frivolous motion.

20 Defendants respectfully request that the Court deny this motion in its entirety and
21 permit discovery to progress in the ordinary course. After Defendants run proportional
22 searches on more than a million documents, and review and produce responsive
23 documents, the parties will be better able to bring to the Court any remaining disputes.
24 If a real dispute arises after a record of documents has been produced, it can be resolved
25 at that time. This, however, is not a real discovery dispute. It is an attempt to brandish a
26 threatened court order like a weapon, seeking unbelievably broad orders regarding
27 untested keyword searches at the outset of the ESI process, long before parties would
28 normally raise such a dispute. Plaintiff's motion should be denied.

DISPUTED DISCOVERY REQUESTS

I. Plaintiff's Argument

A. ESI

Plaintiff seeks an order compelling Defendants to conduct ESI searches using specific search terms, custodians, and time periods, as set forth below.

1. The Parties' Meet and Confer

On December 22, 2016, Plaintiff propounded Requests for Production (Set One) to Defendant Starz Entertainment, LLC (Starz). Olney Decl. ¶ 2, Ex. 1. On January 6, 2017, Plaintiff sent Defendants a letter proposing that the Parties implement a process of meeting and conferring regarding ESI matters within 1-2 weeks of service of any RFPs. Olney Decl. ¶ 3, Ex. 2. Over the following weeks, the parties exchanged a large number of emails and letters, held three telephonic conference, and met in-person for a pre-filing conference pursuant to Local Rule 37-1. Olney Decl. ¶¶ 3-17, Exs. 2-15.

Over the course of their meet and confer, Plaintiff sent Defendants multiple ESI proposals, beginning on January 27. Olney Decl. ¶¶ 5, 8, 11, 13, 14, Exs. 3, 6, 11. Defendants have rejected every proposal on grounds including their assertion that the requests are "unduly burdensome, and not proportional to the needs of the case." Olney Decl. ¶¶ 6, 12, Ex. 4, 9. However, Defendants have abandoned their initial promise to provide emails counts for each custodian, information Plaintiff requires to assess the scope of the burden, see how it is distributed among the proposed custodians and searches, and thus permit Plaintiff to make any necessary revisions to his proposals. Olney Decl. ¶¶ 13, 15-17, Exs. 11, 13-15. Defendants have also objected that Plaintiff's proposed custodians are duplicative, even though they acknowledge that their software can automatically identify any duplicates. Olney Decl. ¶¶ 9, 12, Exs. 7, 9.

This issue is ripe for resolution by the Court because Defendants have effectively guaranteed further interminable delay. Defendants are yet to provide any response to Plaintiff's most recent proposal on February 13, stating that they may require *three*

1 weeks or even longer to respond. Olney Decl. ¶ 16, Ex. 14.¹ More problematic, even
2 though the Parties' respective proposals overlap on several points, Defendants have
3 refused to begin conducting *any* email searches using terms, custodians, and time
4 periods to which the Parties had already agreed until every last detail of the ESI
5 parameters had been resolved. Olney Decl. ¶ 15, Ex. 13.

6 A final point of contention arises from Defendants' refusal to agree to search their
7 employees' personal electronic devices if those devices are used for work-related
8 purposes. Olney Decl. ¶¶ 7, 11, Ex. 5.

9 **2. Plaintiff's ESI Proposals**

10 Plaintiff's initial ESI proposal included more than 50 custodians concentrated into
11 6 general searches. At Defendants' request, Plaintiff has removed half these custodians,
12 and has split his small number of general searches into a larger number of narrowly
13 tailored searches targeted to individual issues and corresponding custodians and dates.
14 Olney Decl. ¶ 13, Ex. 11. In other words, although the number of searches is large, they
15 seek substantially less information than the initial 6 general searches Plaintiff previously
16 proposed. Plaintiff seeks a Court order directing Defendants to perform the ESI searches
17 set forth below, and to require Defendants to search all ESI devices used for work-
18 related purposes by these custodians, including any personal devices.

19 Plaintiff has proposed 25 custodians consisting of the following individuals:

- 20 • 17 custodians agreed to by Defendants, either individually or conditionally as
21 members of groups of two or three custodians that Defendants proposed

22
23
24 ¹ On February 28, the day after Plaintiff served the initial version of his portion of the
25 joint stipulation, Defendants sent Plaintiff an email containing their first substantive
26 response to Plaintiff's February 13 proposal. Defendants' email discussed new time
27 periods for certain custodians only; it contained no discussion of search terms and
28 provided no timeline for supplying this information. Because Defendants then requested
an extension of time to provide their portion of the joint statement, which Plaintiff
granted, Plaintiff has updated the joint stipulation to reflect this new development. Olney
Decl. ¶ 18, Ex. 27.

Plaintiff choose among;²

- 4 additional custodians whose conduct Defendants placed at issue by identifying them as witnesses in their Initial Disclosures;³
- Pamela Wolfe, the current head of Human Resources who replaced Sheryl Anderson (a custodian agreed to by Defendants) following her departure;
- Ed Huguez, Plaintiff's former longtime supervisor and a witness whom Defendants placed at issue by identifying him as a subject of testimony by 4 of the witnesses identified in their Initial Disclosures;
- Mandie Litton, the former secretary for both Plaintiff and Defendant Thornton; and
- Gregory Maffei, the Chairman of Starz's Board and the individual whose conduct is at the center of Plaintiff's whistleblowing claim under California Labor Code § 1102.5(b).

Olney Decl. ¶¶ 6, 12, 14, 18, Exs. 4, 9, 11, 27. Because at least 12 of these custodians no longer work for Starz, Plaintiff has agreed that all date ranges will terminate on the date

² These custodians are: (1) Plaintiff, (2) Defendant Michael Thornton, the direct supervisor who fired Plaintiff, (3) Sheryl Anderson, the former Executive Vice President of Human Resources, (4) David Laughlin, the Vice President of Human Resources, (5) Chris Albrecht, President and CEO, (6) Glenn Curtis, former Senior President; (7) former General Counsel Steve Beabout, (8) former Senior Vice President of Business and Legal Affairs, Richard Waysdorf, (9) Beth Jennewein, Starz's Executive Director for its Project Management Office, and (10) Kara Tefft, Director of Finance. Defendants have also proposed that Plaintiff select specific custodians from among following groups: one custodian from either (11) former Vice President of Sales and Affiliate Marketing, Christine Carrier, or (12) former Vice President, Randy McCurdy; two custodians from among Plaintiff's former three direct reports, who are (13) former Vice President of Sales and Marketing, Tom Gove, (14) Vice President of Affiliate Sales, Tom Wenzel, and/or (15) former Vice President of Affiliate Marketing, Jennifer Schouten; and one custodian from among either (16) former CFO Scott MacDonald or (17) Vice President of Finance, Joe Zamora. By offering custodians even on this provisional basis, Defendants acknowledge their relevance as custodians.

³ These custodians are Patrick DiBartolomeo, Jamie Doshier, Todd Hoy, and Shree Potts.

1 specified or the custodian's last day of employment with Starz, whichever is earlier.⁴

2 Plaintiff proposes the following specific searches and corresponding time periods
3 for the custodians identified above:

4 *a. Searches Related to Plaintiff's Termination and*
5 *Resulting Claims (1-15)*

6 Search Number 1

7 Search number 1 seeks information relevant to Plaintiff's termination. The first
8 parenthetical captures iterations of Plaintiff's name, and is used in many subsequent
9 searches. The second parenthetical includes terms referencing Plaintiff's termination,
10 performance, any discipline or lack thereof, and whistleblowing, most of which were
11 proposed by Defendants. The date begins with the day on which Thornton became
12 Plaintiff's direct supervisor. Ex. 27. Custodians include Human Resources executives
13 (Anderson, Laughlin, Wolfe), and Albrecht, Curtis, and Thornton, all of whom
14 Defendants proposed adding to a nearly identical search. Exs. 8, 9. Tefft is included
15 because Plaintiff was terminated very shortly after he refused her directive to falsify
16 company records. Beabout, Carrier, Gove, McCurdy, Schouten, Waysdorf, Wenzel, and
17 Weil are included because, as alleged in the Second Amended Complaint, they were
18 present for or received complaints regarding incidents motivating Starz's retaliation
19 against Mr. Thomas. Dates for this and every subsequent search that includes Plaintiff's
20 name run through the present because, even though he was terminated in October 2014,
21 any subsequent discussions involving Plaintiff's name are likely of infrequent
22 occurrence and are reasonably calculated to include information relevant to his
23 termination and/or lawsuit.

- 24 • **Terms:** (Keno OR Thomas OR "Keno Thomas" OR "Keno V. Thomas" OR

25 _____
26 ⁴ Because Defendants rejected Plaintiff's attempt to reach an informal compromise,
27 Plaintiff has slightly revised his proposals as set forth in the instant motion to expand
28 several proposals, narrow others, correct several typos, and to make the information
more digestible for the Court. Nonetheless, nearly all of the proposals set forth below
remain identical to the proposal Plaintiff sent Defendants on February 13.

“Thomas, Keno” OR KVT OR Keno.Thomas) AND (terminat* OR consolidat* OR "lay off" OR layoff OR "laid off" OR layoffs OR "lays off" OR "layed off" OR fire OR fired OR "get rid of" OR dismiss OR sack OR "let go" OR “Employee Evaluation” OR “Employee Self Evaluation” OR Probation OR Discipline OR “Performance Plan” OR Complaint OR Report OR whistleblower*⁵)

- **Custodians:** Albrecht, Anderson, Curtis, Laughlin, Tefft, Thomas, Thornton, Wolfe, Beabout, Carrier, Gove, McCurdy, Schouten, Waysdorf, Wenzel, Weil
- **Dates:** Dates: 8/1/13—present

Search Number 2

Search number 2 seeks ESI related to Plaintiff’s whistleblowing regarding Starz’s unlawful contract extension with Comcast, which forms the predicate for his statutory claim under California Labor Code § 1102.5(b). Custodians include individuals to whom Plaintiff complained about this deal or who would likely have been informed of Plaintiff’s complaints. This search begins in April 2014, the month when Starz’s extension with Comcast was announced.

- **Terms:** (Keno OR Thomas OR “Keno Thomas” OR “Keno V. Thomas” OR “Thomas, Keno” OR KVT OR Keno.Thomas) AND Comcast
- **Custodians:** Albrecht, Anderson, Beabout, Carrier, Gove, Laughlin, McCurdy, Schouten, Thomas, Thornton, Waysdorf, Weil, Wenzel, Wolfe
- **Dates:** 4/1/14—present

Search Number 3

Search number 3 seeks ESI related to Plaintiff’s advocacy on behalf of women and minorities, the predicate for his statutory claims under 42 U.S.C. § 1981 and California Government Code § 12940. It also seeks ESI related to purported reasons Defendants assert were responsible for his termination, such as alleged performance

⁵ The * symbol is an infinite wildcard in Defendants’ ESI software program and will return all words beginning with the root preceding this symbol.

1 issues, violations of policies and procedures, trips to call centers, office affairs, abuse of
2 Starz's travel policy, opposition to Starz's Originals strategy, and poor management
3 skills. The date begins with the day on which Thornton became Plaintiff's direct
4 supervisor.

- 5 • **Terms:** (Keno OR Thomas OR "Keno Thomas" OR "Keno V. Thomas" OR
6 "Thomas, Keno" OR KVT OR Keno.Thomas) AND ((Advoca* OR Divers* OR
7 Race OR Minorit* OR Black OR African-American OR Gender OR Women) OR
8 Skill* OR Ability OR Capacity OR Perform* OR Competence OR (Violat* AND
9 (Polic* OR Procedure*)) OR "Call Center" OR "Call Centers" OR Travel OR
10 Affair OR (Relationship AND (Personal OR Sexual OR Romantic OR
11 Inappropriate)) OR Original* OR (Leadership AND Diversi*) OR Supervis* OR
12 Manag*)
- 13 • **Custodians:** Albrecht, Anderson, Laughlin, Thomas, Thornton, Wolfe
- 14 • **Dates:** 8/1/13—present

15 Search Number 4

16 Search number 4 seeks ESI related to Plaintiff and Albrecht's and Thornton's
17 directive that Tefft order Plaintiff to falsify revenue and subscriber figures. The date
18 begins three months prior to the September 2014 meeting in which Tefft ordered
19 Plaintiff to falsify these figures.

- 20 • **Terms:** (Keno OR Thomas OR "Keno Thomas" OR "Keno V. Thomas" OR
21 "Thomas, Keno" OR KVT OR Keno.Thomas) AND (Budget OR Revenue OR
22 Forecast OR Projection OR Subscriber*) AND (Increase OR Raise OR Revise OR
23 Change OR Optic OR Optics))
- 24 • **Custodians:** Albrecht, Anderson, Laughlin, Tefft, Thomas, Thornton, Wolfe
- 25 • **Dates:** 6/1/14—present

26 Search Number 5

27 Search number 5 seeks ESI related to Albrecht's and Thornton's concerns that the
28 optics of Plaintiff's budget did not look good, and their subsequent order to falsify these

1 figures. Custodians include Gove, Schouten, and Wenzel, who were each present at the
2 September 2014 meeting in which Tefft, at the behest of Albrecht and Thornton, ordered
3 Plaintiff to falsify these figures. The date runs through the date on which is termination
4 was ultimately made effective.

- 5 • **Terms:** (Revenue OR Budget OR Forecast OR Projection) AND (Increase OR
6 Raise OR Revise OR Change OR Optic*)
- 7 • **Custodians:** Albrecht, Anderson, Laughlin, Gove, Schouten, Tefft, Thomas,
8 Thornton, Wenzel
- 9 • **Dates:** 6/1/14—2/23/15

10 Search Number 6

11 Like search number 5, search number 6 seeks ESI related to the directive to falsify
12 revenue and subscriber information, but is aimed at capturing communications with
13 Human Resources. Accordingly, search terms include Plaintiff's name and custodians
14 are limited to Human Resources senior executives. The beginning date is the week of
15 the September 2014 meeting.

- 16 • **Terms:** (Keno OR Thomas OR "Keno Thomas" OR "Keno V. Thomas" OR
17 "Thomas, Keno" OR KVT OR Keno.Thomas) AND (Revenue OR Budget OR
18 Forecast OR Projection) AND (Increase OR Raise OR Revise OR Change OR
19 Optic OR Optics)
- 20 • **Custodians:** Anderson, Laughlin, Wolfe
- 21 • **Dates:** 9/1/14—present

22 Search Number 7

23 Search number 7 seeks ESI related to Plaintiff and Starz's negotiations with
24 DirecTV. These negotiations are relevant because Plaintiff was excluded from them in
25 retaliation for his advocacy and whistleblowing, and because Defendants' attempt to
26 force Plaintiff to falsify the revenue and subscriber figures was intended to cover up the
27 shortfalls resulting from the executed deal. Custodians include Plaintiff's direct reports
28 (Gove, Schouten, and Wenzel), two of whom Defendants proposed including as

1 custodians in a similar search. The 9/1/13 date coincides with the start of the
2 negotiations with DirecTV.

- 3 • **Terms:** (Keno OR Thomas OR “Keno Thomas” OR “Keno V. Thomas” OR
4 “Thomas, Keno” OR KVT OR Keno.Thomas) AND (DIRECTV OR DTV) AND
5 Negotiat*
- 6 • **Custodians:** Albrecht, Anderson, Gove, Laughlin, Schouten, Thomas, Thornton,
7 Wenzel, Wolfe
- 8 • **Dates:** 9/1/13—present

9 Search Number 8

10 Search number 8 seeks ESI related to Plaintiff’s sale of company stock, which
11 Defendants have identified in their Initial Disclosures as a purported factor in his
12 termination. The beginning date coincides with Plaintiff’s sale of stock.

- 13 • **Terms:** (Keno OR Thomas OR “Keno Thomas” OR “Keno V. Thomas” OR
14 “Thomas, Keno” OR KVT OR Keno.Thomas) AND (Stock OR Share*)
- 15 • **Custodians:** Albrecht, Anderson, Laughlin, Thomas, Thornton, Wolfe
- 16 • **Dates:** 2/1/14—present

17 Search Number 9

18 Search number 9 seeks ESI related to Plaintiff’s advocacy on behalf of women
19 and minorities. Custodians include Plaintiff’s former boss, Ed Huguez; his direct
20 reports, and Shree Potts, with whom he discussed his efforts to increase diversity at Starz
21 through hiring practices.

- 22 • **Terms:** (Keno OR Thomas OR “Keno Thomas” OR “Keno V. Thomas” OR
23 “Thomas, Keno” OR (Keno /2 Thomas) OR KVT OR Keno.Thomas) AND
24 (Divers* OR Race OR Minorit* OR Black OR (African AND American) OR
25 Gender OR Women OR Hire OR Recruit OR Promote OR Consolidat* OR LIFO
26 OR “Last In First Out”)
- 27 • **Custodians:** Albrecht, Anderson, Laughlin, Potts, Thomas, Thornton, Gove,
28 Shouten, Wenzel, Huguez

- **Dates:** 1/1/10 – 2/23/15

Search Number 10

Search number 10 seeks ESI related to me-too evidence of other employees' complaints on topics similar to Plaintiff's complaints, such as harassment and discrimination on the basis of gender or race, retaliation, and falsification of company documents.⁶

- **Terms:** (Complaint OR EEOC OR DFEH OR Hotline) AND (Race OR Ethnicity OR Black OR (African AND American) OR Latin* OR Asian OR Gender OR Harassment OR Discrimination OR Retaliation OR Falsif!)
- **Custodians:** Albrecht, Anderson, Laughlin, Wolfe, Thomas, Thornton
- **Dates:** 1/1/10—February 23, 2015

Search Number 11

Search number 11 seeks ESI related to Starz's 2014 contract negotiations and contract extension with Comcast, which is relevant because the unlawful manner in which this deal was negotiated forms the predicate for Plaintiff's § 1102.5(b) whistleblowing claim. (Search number 2, by contrast, includes Plaintiff's name and focuses only on his whistleblowing regarding this topic.) Search number 11 includes 4 sets of custodians with corresponding dates. Set 1 includes individuals involved in negotiation of the deal, and starts three months before it was executed. Set 2 adds individuals present at April 28, 2014, dinner at which the deal was announced or to whom Plaintiff complained, and includes Beabout, whom Huguez informed of the deal after speaking with Plaintiff. Set 2 starts the day of the April 28 dinner. Sets 3 and 4 add other individuals to whom Plaintiff complained at later dates.

⁶ During the meet and confer, Defendants expressed skepticism that me-too evidence could be relevant in a retaliation case and/or where the other bad acts are perpetrated by someone other than the Plaintiff's own supervisor. Plaintiff informed Defendants that ample authority demonstrates the relevance of such information, and cited *Goold v. Hilton Worldwide, Inc.*, No. 1:13-cv-00438 JLT, 2014 U.S. Dist. LEXIS 48652 (E.D. Cal. Apr. 8, 2014). Ex. 11.

- **Terms:** Comcast AND (Palm OR “4/28” or “April 28” OR Contract OR “Affiliate Carriage” OR Extension OR Renew! OR Deal OR “Affiliation Agreement” OR Negotiat! OR “Revenue Budget” OR “Marketing Support” OR Maffei OR Charter OR “Charter Communications” OR “Charter Inc.” OR “Time Warner” OR “Time Warner Cable” OR TWC OR Merg* OR DOJ OR Spinco OR Subscribers OR “License Fee” OR Maffei OR Greg* OR Chairman OR (Inside* /2 Information))
- 1. **Custodians & Dates:** Albrecht, Thornton, McCurdy, Maffei: 2/1/14—present
- 2. **Custodians & Dates:** Beabout, Carrier, Gove, Schouten, Thomas, Wenzel: 4/28/14—present
- 3. **Custodians & Dates:** Waysdorf: 7/1/14—present
- 4. **Custodians & Dates:** Curtis, Weil: 8/22/14—present

Search Number 12

Search number 12 seeks ESI related to the DirecTV deal, including discussions related to deal’s impact on Starz’s budget, which is relevant to Defendants’ efforts to force Plaintiff to falsify those budgets once they discovered that the results would fall short of their expectations. Custodians include Plaintiff and his team, who were involved in putting together the budget; individuals involved in the decision to falsify the budget figures; and Zamora and MacDonald, who were broadly responsible for Starz’s financial performance and projections. The beginning date coincides with the beginning of the negotiations with DirecTV and runs through the date that Plaintiff’s termination became final.

- **Terms:** (DIRECTV OR DTV) AND (Contract OR Extension OR Renew! OR Deal OR “Affiliation Agreement” OR Negotiat! OR “Revenue Budget” OR “Subscriber Projection” OR (Project! /s Revenue) OR (Project! /s Loss) OR “Revenue Forecast” OR “Budget Forecast” OR “Budget Projection” OR Variance OR Perform* OR “License Fee” OR Remov* OR Optic* OR (Plausibl* w/2 Denia*))
- **Custodians:** Albrecht, Thomas, Thornton, Tefft, Wenzel, Gove, Schouten,

MacDonald, Zamora

- **Dates:** 9/1/13—2/23/15

Search Number 13

Search number 13 seeks the same information as number 12, but is limited to ESI containing Plaintiff's name. It includes a broader list of custodians and begins with the date Plaintiff's termination became final.

- **Terms:** (Keno OR Thomas OR "Keno Thomas" OR "Keno V. Thomas" OR "Thomas, Keno" OR KVT OR Keno.Thomas) AND ((DIRECTV OR DTV) AND (Contract OR Extension OR Renew! OR Deal OR "Affiliation Agreement" OR Negotiat! OR "Revenue Budget" OR "Subscriber Projection" OR (Project! /s Revenue) OR (Project! /s Loss) OR "Revenue Forecast" OR "Budget Forecast" OR "Budget Projection" OR Variance OR Perform* OR "License Fee" OR Remov* OR Optic* OR (Plausibl* w/2 Denia*)))
- **Custodians:** Albrecht, Thomas, Thornton, Tefft, Wenzel, Gove, Schouten, MacDonald, Zamora, Carrier, McCurdy, Waysdorf
- **Dates:** 2/23/15—present

Search Number 14

Search number 14 seeks ESI related to the "DirecTV Cross Functional Team." Plaintiff was excluded from communications regarding this team, and possibly from meetings as well, in retaliation for his protected activities. Ex. 25 ¶ 53. Custodians include all Team members known to Plaintiff. The dates begin the 2 months before the first Team meeting known to Plaintiff and continue through the date his termination became final.

- **Terms:** (DIRECTV OR DTV) AND "Cross Functional Team"
- **Custodians:** Albrecht, Thomas, Thornton, Carrier, McCurdy, Wenzel, Gove, Schouten, Anderson Jennewein, MacDonald, Curtis, Weil, Anderson, Zamora, Tefft, Waysdorf, Hoy, Wenzel, Litton
- **Dates:** 6/1/14—2/23/15

1 Search Number 15

2 Search number 15 seeks ESI related to Starz's "Originals" Strategy. Defendants
3 have identified Plaintiff's purported disagreement with this company strategy as a
4 purported factor justifying his termination. Custodians include Plaintiff's direct reports,
5 who are likely to have information regarding Plaintiff's position regarding the Originals
6 strategy, as well as Carrier and McCurdy, because Defendants identified this topic for
7 both witnesses in their Initial Disclosures.

- 8 • **Terms:** Original* /15 Strategy
- 9 • **Custodians:** Albrecht, Anderson, Laughlin, Carrier, McCurdy, Thornton,
10 Thomas, Wenzel, Gove, Schouten

11 **Dates:** 8/16/13—2/23/15

12 *b. Searches Related to Defendants' Witnesses (16-56)*

13 Search numbers 16-56 seek information relevant to the topics of testimony which
14 Defendants placed at issue by identifying in their initial disclosures for each of their
15 witnesses. Ex. 12. In an attempt to narrow the time period for these searches, Plaintiff
16 proposed that Defendants identify the period of time during which they intend to offer
17 testimony so that he could narrow the period of his ESI searches accordingly.
18 Defendants rejected this proposal, however. Ex. 10 at 3. For this reason, Plaintiff
19 begins each search on January 1, 2010, or on the first known specific known date
20 relevant to the identified topic, whichever is later. Plaintiff remains open to revising the
21 start dates for these searches but has been unable to do so prior to preparing his portion
22 of the joint stipulation because Defendants have rejected his proposal to identify discreet
23 time periods.

24 Search Number 16

- 25 • **Terms:** (Keno OR Thomas OR "Keno Thomas" OR "Keno V. Thomas" OR
26 "Thomas, Keno" OR KVT OR Keno.Thomas) AND (Perform* OR Original* OR
27 Travel OR Affair OR (Relationship AND (Personal OR Sexual OR Romantic OR
28 Inappropriate)) OR (Leadership AND Divers*))

- **Custodians:** Anderson
- **Dates:** 1/1/10—present

Search Number 17

- **Terms:** (Keno OR Thomas OR “Keno Thomas” OR “Keno V. Thomas” OR “Thomas, Keno” OR KVT OR Keno.Thomas) AND (Stock OR Share*)
- **Custodians:** Anderson
- **Dates:** 2/1/14—present

Search Number 18

- **Terms:** (Keno OR Thomas OR “Keno Thomas” OR “Keno V. Thomas” OR “Thomas, Keno” OR KVT OR Keno.Thomas) AND Comcast
- **Custodians:** Carrier
- **Dates:** 4/1/14—present

Search Number 19

- **Terms:** (Keno OR Thomas OR “Keno Thomas” OR “Keno V. Thomas” OR “Thomas, Keno” OR KVT OR Keno.Thomas) AND (Original* OR Huguez OR Ed)
- **Custodians:** Carrier
- **Dates:** 1/1/10—present

Search Number 20

- **Terms:** (Reports OR Subordinates OR Staff OR Tom OR Gove OR Wenzel OR Jennifer OR Schouten OR Tom.Gove OR Tom.Wenzel OR Jennifer.Schouten OR VP OR “Vice President”) AND (Skill* OR Ability OR Capacity OR Training OR Perform* OR Competence)
- **Custodians:** Carrier
- **Dates:** 1/1/10—present

Search Number 21

- **Terms:** (Keno OR Thomas OR “Keno Thomas” OR “Keno V. Thomas” OR “Thomas, Keno” OR KVT OR Keno.Thomas) AND Comcast

- **Custodians:** Curtis
- **Dates:** 4/1/14—present

Search Number 22

- **Terms:** (Keno OR Thomas OR “Keno Thomas” OR “Keno V. Thomas” OR “Thomas, Keno” OR KVT OR Keno.Thomas) AND (Original* OR Perform* OR Competence OR Reputation)
- **Custodians:** Curtis
- **Dates:** 1/10/10—present

Search Number 23

- **Terms:** (Keno OR Thomas OR “Keno Thomas” OR “Keno V. Thomas” OR “Thomas, Keno” OR KVT OR Keno.Thomas) AND (Stock OR Share*)
- **Custodians:** Curtis
- **Dates:** 2/1/14—present

Search Number 24

- **Terms:** (Keno OR Thomas OR “Keno Thomas” OR “Keno V. Thomas” OR “Thomas, Keno” OR KVT OR Keno.Thomas) AND (Supervis* OR Manag* OR Lead OR Leader OR Original* OR “Call Center” OR “Call Centers”)
- **Custodians:** DiBartolomeo
- **Dates:** 1/10/10—present

Search Number 25

- **Terms:** (Keno OR Thomas OR “Keno Thomas” OR “Keno V. Thomas” OR “Thomas, Keno” OR KVT OR Keno.Thomas) AND (Supervis* OR Manag* OR Lead OR Leader OR Original* OR “Call Center” OR “Call Centers”)
- **Custodians:** Doshier
- **Dates:** 1/10/10—present

Search Number 26

- **Terms:** (Keno OR Thomas OR “Keno Thomas” OR “Keno V. Thomas” OR “Thomas, Keno” OR KVT OR Keno.Thomas) AND Comcast

- **Custodians:** Gove
- **Dates:** 4/1/14—present

Search Number 27

- **Terms:** (Keno OR Thomas OR “Keno Thomas” OR “Keno V. Thomas” OR “Thomas, Keno” OR KVT OR Keno.Thomas) AND (Tefft OR Kara OR Michael OR Thornton) AND (Budget OR Revenue OR Subscriber OR Project* OR Forecast OR Optic*)
- **Custodians:** Gove
- **Dates:** 9/1/14—present

Search Number 28

- **Terms:** (Keno OR Thomas OR “Keno Thomas” OR “Keno V. Thomas” OR “Thomas, Keno” OR KVT OR Keno.Thomas) AND (Michael OR Thornton) AND (DIRECTV OR DTV)
- **Custodians:** Gove
- **Dates:** 9/1/13—present

Search Number 29

- **Terms:** (Keno OR Thomas OR “Keno Thomas” OR “Keno V. Thomas” OR “Thomas, Keno” OR KVT OR Keno.Thomas) AND Comcast
- **Custodians:** Hoy
- **Dates:** 4/1/14—present

Search Number 30

- **Terms:** “Revenue Forecast” OR “Budget Forecast” OR “Revenue Budget” OR “Budget Projection” OR Variance
- **Custodians:** Hoy
- **Dates:** 1/1/10—present

Search Number 31

- **Terms:** (Huguez OR Ed) AND (Client OR Employee OR Staff OR Comment OR Behavior OR Inappropriate)

- **Custodians:** Hoy
- **Dates:** 1/1/10—present

Search Number 32

- **Terms:** (Keno OR Thomas OR “Keno Thomas” OR “Keno V. Thomas” OR “Thomas, Keno” OR KVT OR Keno.Thomas) AND (DIRECTV OR DTV) AND (Concern OR Complaint OR Negotiat* OR Met OR Meet*)

- **Custodians:** Jennewein
- **Dates:** 8/1/14—present

Search Number 33

- **Terms:** (Keno OR Thomas OR “Keno Thomas” OR “Keno V. Thomas” OR “Thomas, Keno” OR KVT OR Keno.Thomas) AND Comcast

- **Custodians:** MacDonald
- **Dates:** 4/1/14—present

Search Number 34

- **Terms:** “Revenue Forecast” OR “Revenue Budget” OR “Budget Forecast” OR “Budget Projection” OR “Subscriber Projection”

- **Custodians:** MacDonald
- **Dates:** 1/1/10—2/23/15

Search Number 35

- **Terms:** (DIRECTV OR DTV) AND (Revenue OR Loss OR Project* OR Variance OR Actual OR Perform*)

- **Custodians:** MacDonald
- **Dates:** 9/1/13—present

Search Number 36

- **Terms:** Deal AND ((Executive AND (Sr OR Senior)) OR SVP OR EVP OR Thornton OR Albrecht OR Maffei OR Greg* OR Malone OR John OR Curtis OR Glenn OR Myers OR Bill)

- **Custodians:** MacDonald

- **Dates:** 1/1/10—present

Search Number 37

- **Terms:** (Keno OR Thomas OR “Keno Thomas” OR “Keno V. Thomas” OR “Thomas, Keno” OR KVT OR Keno.Thomas) AND Comcast
- **Custodians:** McCurdy
- **Dates:** 4/1/14—present

Search Number 38

- **Terms:** (Keno OR Thomas OR “Keno Thomas” OR “Keno V. Thomas” OR “Thomas, Keno” OR KVT OR Keno.Thomas) AND Original*
- **Custodians:** McCurdy
- **Dates:** 1/1/10—present

Search Number 39

- **Terms:** (Report* OR Tom OR Gove OR Wenzel OR Jennifer OR Schouten OR Tom.Gove OR Tom.Wenzel OR Jennifer.Schouten OR Staff OR VP OR “Vice President”) AND (Skill* OR Ability OR Capacity OR Training OR Perform* OR Competence)
- **Custodians:** McCurdy
- **Dates:** 1/1/10—present

Search Number 40

- **Terms:** Keno OR Thomas OR “Keno Thomas” OR “Keno V. Thomas” OR “Thomas, Keno” OR KVT OR Keno.Thomas
- **Custodians:** Potts
- **Dates:** 6/1/10—present

Search Number 41

- **Terms:** “Revenue Forecast” OR “Revenue Budget” OR “Budget Forecast” OR “Budget Projection” OR “Subscriber Projection”
- **Custodians:** Tefft
- **Dates:** 1/1/10—2/23/15

1 Search Number 42

- 2 • **Terms:** (DIRECTV OR DTV) AND (Revenue OR Loss OR Project* OR
3 Variance OR Actual OR Perform*)
4 • **Custodians:** Tefft
5 • **Dates:** 9/1/13—2/23/15

6 Search Number 43

- 7 • **Terms:** (Revenue OR Budget OR Forecast OR Projection) AND (Increase OR
8 Raise OR Revise OR Change OR Optic*) AND (Michael OR Thornton OR
9 Michael.Thornton OR Keno OR Thomas OR Keno.Thomas)
10 • **Custodians:** Tefft
11 • **Dates:** 6/1/14—present

12 Search Number 44

- 13 • **Terms:** (Keno OR Thomas OR “Keno Thomas” OR “Keno V. Thomas” OR
14 “Thomas, Keno” OR KVT OR Keno.Thomas OR Christine OR Carrier OR
15 Christine.Carrier OR Randy OR McCurdy OR Randy.McCurdy) AND (Perform*
16 OR Competence OR Skill* OR Ability OR Capacity OR Compare OR Compared
17 OR “Relative to”)
18 • **Custodians:** Tefft
19 • **Dates:** 1/1/10—2/23/15

20 Search Number 45

- 21 • **Terms:** (Keno OR Thomas OR “Keno Thomas” OR “Keno V. Thomas” OR
22 “Thomas, Keno” OR KVT OR Keno.Thomas) AND Manage*
23 • **Custodians:** Wenzel
24 • **Dates:** 1/1/10—present

25 Search Number 46

- 26 • **Terms:** (Keno OR Thomas OR “Keno Thomas” OR “Keno V. Thomas” OR
27 “Thomas, Keno” OR KVT OR Keno.Thomas) AND Comcast
28 • **Custodians:** Wenzel

- **Dates:** 4/1/14—present

Search Number 47

- **Terms:** (Keno OR Thomas OR “Keno Thomas” OR “Keno V. Thomas” OR “Thomas, Keno” OR KVT OR Keno.Thomas) AND (Michael OR Thornton OR Michael.Thornton) AND (Threat* OR terminat* OR consolidat* OR "lay off" OR layoff OR "laid off" OR layoffs OR "lays off" OR "layed off" OR fire OR fired OR "get rid of" OR dismiss OR sack OR "let go" OR Complaint OR Report OR Discipline OR “Performance Plan” OR “Employee Evaluation” OR “Employee Self Evaluation” OR Probation)

- **Custodians:** Wenzel

- **Dates:** 8/16/13—present

Search Number 48

- **Terms:** (Keno OR Thomas OR “Keno Thomas” OR “Keno V. Thomas” OR “Thomas, Keno” OR KVT OR Keno.Thomas) AND (DIRECTV OR DTV)

- **Custodians:** Wenzel

- **Dates:** 1/1/10—present

Search Number 49

- **Terms:** (Keno OR Thomas OR “Keno Thomas” OR “Keno V. Thomas” OR “Thomas, Keno” OR KVT OR Keno.Thomas) AND (Michael OR Thornton OR Michael.Thornton) AND (DIRECTV OR DTV)

- **Custodians:** Wenzel

- **Dates:** 8/16/13—present

Search Number 50

- **Terms:** (Revenue OR Budget OR Forecast OR Projection) AND (Increase OR Raise OR Revise OR Change OR Optic OR Optics) AND (Keno OR Thomas OR Keno.Thomas OR KVT OR Michael OR Thornton OR Michael.Thornton OR Kara OR Tefft OR Kara.Tefft)

- **Custodians:** Wenzel

- **Dates:** 8/1/14—present

Search Number 51

- **Terms:** (Keno OR Thomas OR “Keno Thomas” OR “Keno V. Thomas” OR “Thomas, Keno” OR KVT OR Keno.Thomas) AND Comcast
- **Custodians:** Zamora
- **Dates:** 8/1/14—present

Search Number 52

- **Terms:** (Keno OR Thomas OR “Keno Thomas” OR “Keno V. Thomas” OR “Thomas, Keno” OR KVT OR Keno.Thomas) AND (DIRECTV OR DTV)
- **Custodians:** Zamora
- **Dates:** 1/1/10—present

Search Number 53

- **Terms:** Ed OR Huguez
- **Custodians:** Zamora
- **Dates:** 1/1/10—present

Search Number 54

- **Terms:** “Revenue Forecast” OR “Revenue Budget” OR “Budget Forecast” OR “Budget Projection” OR “Subscriber Projection” OR ((Revenue OR Project*) AND Bonus))
- **Custodians:** Zamora
- **Dates:** 1/1/10—present

Search Number 55

- **Terms:** (DIRECTV OR DTV) AND (Revenue OR Loss OR Project* OR Variance OR Actual OR Perform*)
- **Custodians:** Zamora
- **Dates:** 9/1/13—present

Search Number 56

- **Terms:** (Keno OR Thomas OR “Keno Thomas” OR “Keno V. Thomas” OR

1 “Thomas, Keno” OR KVT OR Keno.Thomas OR Christine OR Carrier OR
2 Christine.Carrier OR Randy OR McCurdy OR Randy.McCurdy) AND (Perform*
3 OR Competence OR Skill* OR Ability OR Capacity OR Compare OR Compared
4 OR “Relative to”)

- 5 • **Custodians:** Zamora
- 6 • **Dates:** 1/1/10—present

7 3. Legal Argument

8 Plaintiff seeks a Court order directing Defendants to perform the ESI searches set
9 forth above. These searches are narrowly tailored and seek relevant information that is
10 proportional to the needs of this case.

11 The federal rules provide broad access to discovery. “Parties may obtain
12 discovery regarding any nonprivileged matter that is relevant to any party’s claim or
13 defense.” Fed. R. Civ. P. 26(b)(1). “Relevant information need not be admissible at the
14 trial if the discovery appears reasonably calculated to lead to the discovery of admissible
15 evidence.” *Id.*

16 Rule 34(a) provides that a party may serve a request that the other party produce
17 or permit the requesting party to inspect, copy, test or sample materials, including
18 electronically stored information falling within the scope of Rule 26(b). Fed. R. Civ. P.
19 34(a)(1)(A). This rule is “designed to permit the broadest sweep of access.” *U.S. ex rel.*
20 *Carter v. Bridgepoint Educ., Inc.*, 305 F.R.D. 225, 236 (S.D. Cal. 2015) (citations
21 omitted). Electronic documents are no less subject to disclosure than paper records,
22 provided the relevance requirement is satisfied. *Id.* at 236 (collecting cases). When
23 assessing relevance, courts recognize that “discovery is not limited to the issues raised in
24 the pleadings,” but encompasses any matter related to, or which is reasonably calculated
25 to lead to other matters related to, any issues in the case. *Oppenheimer Fund, Inc. v.*
26 *Sanders*, 437 U.S. 340, 351-52 (1978). “The party who resists discovery has the burden
27 to show discovery should not be allowed, and has the burden of clarifying, explaining,
28 and supporting its objections.” *Duran v. Cisco Sys., Inc.*, 258 F.R.D. 375, 378 (C.D.

1 Cal. 2009) (citing *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975)).

2 The 2015 amendments to Rule 26 codify the requirement that courts resolving
3 discovery disputes provide access to discovery that is “proportional to the needs of the
4 case, considering the importance of the issues at stake in the action, the amount in
5 controversy, the parties’ relative access to relevant information, the parties’ resources,
6 the importance of the discovery in resolving the issues, and whether the burden or
7 expense of the proposed discovery outweighs its likely benefit.” *Id.* This amendment
8 does not shift the burden, which remains on the party resisting discovery to explain how
9 a request is burdensome. *Design Basics LLC v. Best Built Inc.*, No. 14-CV-597, 2016
10 U.S. Dist. LEXIS 33256, at *9 (E.D. Wis. Mar. 15, 2016) (“[T]he amendment of Rule
11 26(b) to make the proportionality requirement explicit does not relieve the responding
12 party of the burden to explain how a discovery request is burdensome.”); Advisory
13 Notes to Fed. R. Civ. P. 26 (2015 Amendments) (“Nor is the [amendment] intended to
14 permit the opposing party to refuse discovery simply by making a boilerplate objection
15 that it is not proportional.”).

16 Because Defendants have never provided concrete information setting forth the
17 burden they claim Plaintiff’s searches would impose, they have failed to carry their
18 burden and their objection should fail. To the extent they produce such information for
19 the first time in response to the instant motion, an analysis of the Rule 26 factors
20 demonstrates that Defendants’ proportionality objections should still be rejected because
21 every factor weighs strongly in Plaintiff’s favor.

22 First, Plaintiff brings claims under, *inter alia*, the FEHA, California Labor Code §
23 1102.5, and 42 U.S.C. § 1981, each of which are broad remedial statutes embodying
24 broad public policy considerations. *Dep’t of Fair Empl. & Hous. v. Lucent Techs., Inc.*,
25 642 F.3d 728, 752 (9th Cir. 2011) (FEHA); *McVeigh v. Recology S.F.*, 213 Cal. App. 4th
26 443, 471 (2013) (CAL. LAB. CODE § 1102.5); *Sullivan v. Little Huntington Park, Inc.*,
27 396 U.S. 229, 237 (1969) (noting “the broad and sweeping nature of the protection
28 meant to be afforded by § 1 of the Civil Rights Act of 1866” from which § 1981

1 derives). The powerful public policies animating these statutes demonstrates the
2 importance of the issues at stake in this case and weigh strongly in Plaintiff's favor. *See*
3 *Wood v. Capital One Servs., LLC*, No. 5:09-CV-1445 (NPM/DEP), 2011 U.S. Dist.
4 LEXIS 61962, at *20-21 (N.D.N.Y. Apr. 15, 2011) (holding the first factor weighs in
5 plaintiff's favor because "the court recognizes that strong public policy considerations
6 which led to enactment of the" statute under which Plaintiff brought this claim).

7 Second, the amount in controversy in this case is substantial. Plaintiff was a high
8 wage earner at Starz. In 2014 he earned a base salary in excess of \$300,000, a bonus of
9 more than \$140,000, and stock options of more than \$500,000. His total lost earnings
10 between his termination and 2023, when he will turn 65, including lost stock options
11 likely exceeds \$18 million.⁷ The sizable damages at issue in this case justify a broad
12 array of discovery.

13 Third, in this case, as in most employment cases, there is a severe imbalance in the
14 Parties' relative access to relevant information. Defendants have exclusive access to
15 substantially all of the relevant documents in this case, none of which have been
16 provided to date, and represent many of the relevant witnesses, thereby restricting
17 Plaintiff counsel's ability to contact them outside of a deposition. This further supports
18 Plaintiff's broad access to discovery.

19 Fourth, Starz is a large corporation which reported \$1.5 billion in revenues in
20 2015 on its SEC Form 10-K and was acquired by Lionsgate in December 2016 for
21 approximately \$4.4 billion in cash and stock.⁸ Plaintiff, by contrast, is an unemployed

22 ⁷ Discovery is in the early stage and Plaintiff has not yet precisely calculated his
23 economic loss. This figure is a rough estimate offered only for the purpose of providing
24 the Court some guidance with regard to the magnitude of the amount in controversy with
25 regard to the second Rule 26 proportionality factor. Plaintiff reserves all rights to amend
or revise the calculation of his damages as discovery proceeds.

26 ⁸ *See See*

27 [https://www.sec.gov/Archives/edgar/data/1559270/000155927016000051/starzllc_10-](https://www.sec.gov/Archives/edgar/data/1559270/000155927016000051/starzllc_10-kx12312015.htm)
28 <http://variety.com/2016/biz/news/starz-lionsgate-close-acquisition-1201937471/> (last

visited (February 27, 2017).

1 individual. Starz has the resources available to easily respond to Plaintiff's discovery
2 demands, and should be required to do so. *See id.* ("Plainly, Capital One Services and
3 NCO, as large corporations, have resources available to finance the effort that would be
4 required to meet plaintiff's sweeping discovery demands.").

5 Fifth, the discovery Plaintiff seeks is critical in resolving the issues in this case.
6 This action concerns Defendants' motive or motives for terminating Plaintiff. Plaintiff
7 has alleged several unlawful motives, and Defendant has asserted numerous purportedly
8 legitimate ones. All of the discovery sought relates, either directly or circumstantially,
9 to motives put forward by either party. Because unlawful motives are rarely stated
10 directly, circumstantial evidence in particular is critical to a case such as this. *See Allen*
11 *v. Iranon*, 283 F.3d 1070, 1077 (9th Cir. 2002) (discussing use of circumstantial
12 evidence in retaliation cases). In sum, reviewing all of these factors, it is clear that the
13 burden or expense of Plaintiff's proposed discovery does not outweigh its likely benefit.
14 Accordingly, for all of these reasons, Defendants should be directed to perform the ESI
15 searches Plaintiff seeks without further delay. In the alternative, Defendants should at
16 least be directed to provide Plaintiff with concrete information detailing the number of
17 emails for each ESI search by custodian and search, and the approximate cost or time
18 Defendants claim would be required to perform these searches.

19 In addition to the ESI searches, the Parties also disagree as to the repositories of
20 ESI that Defendants must search. The Federal Rules of Civil Procedure require
21 production of relevant material in the "possession, custody, or control" of a party. Fed.
22 R. Civ. P. 26(a), 34(a). In the Ninth Circuit, "control" includes "the legal right to obtain
23 documents upon demand." *United States v. Int'l Union of Petroleum & Indus. Workers*,
24 870 F.2d 1450, 1452 (9th Cir. 1989). The determination of "control" under the Ninth
25 Circuit's standard is fact specific. *Miniaze v. Pac. Mar. Ass'n*, No. C 04-03506 SI, 2006
26 U.S. Dist. LEXIS 17127, at *6 (N.D. Cal. Feb. 13, 2006). One fact pattern satisfying
27 this definition is an employer's ability to remove an employee without cause. *See id.* at
28 *8 (granting motion to compel documents in the possession of defendant's current

1 directors because they could be removed without cause).

2 Because Defendants have not responded to Plaintiff's query whether the proposed
3 custodians may be terminated without cause, Plaintiff has propounded discovery
4 requests as to each proposed custodian. Defendants' responses are unlikely to resolve
5 this issue, however, because Defendants have not agreed that an at-will employment
6 relationship establishes "control" within the meaning of Rule 34 over personal electronic
7 devices their employees use for work-related purposes. Olney Decl. ¶¶ 7, 11.
8 Accordingly, this issue is ripe for determination by the Court. Plaintiff therefore
9 requests a Court order directing Defendants to search its custodian's personal electronic
10 devices and email accounts if it is determined that (1) the custodian may be terminated
11 without cause, or any other basis for establishing Defendant's control is identified, and
12 (2) the custodian uses such device or email account for work-related purposes.

13 **B. Protective Order**

14 The second issue presented by this motion concerns the terms of a protective order
15 in this case. While Plaintiff seeks the use of this Court's own model order, Defendants
16 demand the use of a two-tiered protection scheme including a restrictive "Highly
17 Confidential" designation they may apply to all manner of documents to hide them from
18 Plaintiff and deposition witnesses. Use of this provision would severely prejudice
19 Plaintiff's case and is unsupported by law.⁹

20 A protective order may only be entered upon a showing of "good cause." Fed. R.

21
22 ⁹ Because Defendants are presently withholding production of documents on the ground
23 that no protective order is in place, Plaintiff, in order to move discovery forward, agreed
24 to Defendants' proposed protective order as an interim measure until such time as the
25 Court either affirms that order or enters a new protective order in response to the instant
26 motion. *See* Rutter Group, Fed. Civ. Proc. Before Trial (2016), § 11:1166.1
27 (recommending this procedure). The protective order Plaintiff filed with the Court on
28 February 27, 2017, does not create a heightened standard for such a modification
because the Parties expressly agreed that the execution of Defendants' protective order
would be without prejudice to their ability to seek (or oppose) a new protective order in
this case, and there is thus no reliance interest at issue. *See* Olney Decl. ¶ 31, Exs. 23,
24 at § 4 at page 6:11-20.

1 Civ. P. 26(c)(1). “A party asserting good cause bears the burden, for each particular
2 document it seeks to protect, of showing that specific prejudice or harm will result if no
3 protective order is granted.” *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122,
4 1130 (9th Cir. 2003); *see also San Jose Mercury News, Inc. v. United States Dist. Court*,
5 187 F.3d 1096, 1102 (9th Cir. 1999) (holding that to gain a protective order the party
6 must make “particularized showing of good cause with respect to any individual
7 document”). “If a court finds particularized harm will result from disclosure of
8 information to the public, then it balances the public and private interests to decide
9 whether a protective order is necessary.” *Phillips v. GMC*, 307 F.3d 1206, 1210-11 (9th
10 Cir. 2002); *see also Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1470-71
11 (9th Cir. 1992) (balancing the interests). “Broad allegations of harm, unsubstantiated by
12 specific examples or articulated reasoning, do not satisfy the Rule 26(c) test.” *Beckman*
13 *Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992). Courts have broad
14 discretion “to decide when a protective order is appropriate and what degree of
15 protection is required.” *Foltz*, 331 F.3d at 1130 (quoting *Seattle Times Co. v. Rhinehart*,
16 467 U.S. 20, 36 (1984)).

17 Plaintiff does not dispute that some protective order is appropriate in this case.
18 Rather, he contests the extreme remedy of the “Highly Confidential” designation, which
19 is a level of protection inappropriate to this employment retaliation case. This is because
20 § 7(b) of the protective order limits disclosure of “Highly Confidential” documents to
21 Plaintiff’s counsel and experts. Ex. 24 § 7(b). As a result, counsel may not show such
22 documents to Plaintiff himself or to deposition witnesses.¹⁰

23 A “Highly Confidential” or “Attorney’s eyes only” designation such as the one
24 sought by Defendants in this case is “the most restrictive possible protective order[.]”
25 *Arvco Container Corp. v. Weyerhaeuser Co.*, No. 1:08-cv-548, 2009 U.S. Dist. LEXIS

26 ¹⁰ “Highly Confidential” materials may be viewed only by counsel, experts, the Court
27 including its personnel and staff, court reporters, professional jury or trial consultants,
28 professional vendors, the document’s authors and recipients, persons who possessed or
knew the information, and mediators, settlement officers, and their staff. Ex. 24 § 7(b).

1 9264, at *14 (W.D. Mich. Feb. 9, 2009) (discussing an “attorney’s eyes only”
2 designation limiting disclosure to plaintiff’s attorneys and expert witnesses). As such, it
3 is a “drastic remedy” appropriate only “in rare instances” due to its substantial negative
4 impact on the receiving party. *Ragland v. Blue Cross Blue its Shield of N.D.*, No. 1:12-
5 cv-080, 2013 U.S. Dist. LEXIS 99369, at *3, 4 (D.N.D. June 25, 2013). This severe
6 restriction “limits the ability of the receiving party to view the relevant evidence, fully
7 discuss it with counsel, and make intelligent litigation decisions.” *Id.* at *3-4. It also
8 “limits the ability of a party to provide needed assistance to counsel.” *Id.* at *4; *see also*
9 *Arvco Container Corp.*, 2009 U.S. Dist. LEXIS 9264, at *15-16 (“It is clear to this court
10 that the indiscriminate use of ‘attorney’s eyes only’ protective orders does pose a
11 significant handicap on the restricted litigant. Discovery, trial preparation, and trial are
12 made more difficult and expensive if an attorney cannot make complete disclosure of the
13 facts to the litigant.”).

14 Because protective orders containing a “Highly Confidential” are so disruptive to
15 a plaintiff’s case, courts routinely deny them where the producing party fails to identify
16 “a clearly defined and serious injury to the party seeking extraordinary confidential
17 treatment.” *See id.* at *16-18, 23; *Dorchen/Martin Assoc., Inc. v. Brook of Cheboygan*,
18 No. 11-10561, 2012 U.S. Dist. LEXIS 73791, at *3-4 (E.D. Mich. May 29, 2012); *MGP*
19 *Ingredients, Inc. v. Mars, Inc.*, 245 F.R.D. 497, 500-02 (D. Kan. 2007); *Medtronic*
20 *Sofamor Danek, Inc. v. Michelson*, No. 01-2373-GV, 2002 U.S. Dist. LEXIS 27981, at
21 *14-16 (W.D. Tenn. Jan. 30, 2002); *Frees, Inc. v. McMillian*, No. 05-1979, 2007 U.S.
22 Dist. LEXIS 4343, at *14-16 (W.D. La. Jan. 22, 2007); *Burris v. Versa Products, Inc.*,
23 No. 07-3938, 2013 U.S. Dist. LEXIS 21851, at *7-8 (D. Minn. Feb. 19, 2013); *EQ*
24 *Oklahoma, Inc. v. A Clean Env’t Co.*, No. 11-CV-510, 2012 U.S. Dist. LEXIS 159571,
25 at *3-5 (N.D. Okla. Nov. 7, 2012); *Ragland*, 2013 U.S. Dist. LEXIS 99369, *7; *Wanke*
26 *Cascade Distrib. v. Forbo Flooring, Inc.*, No. 3:13-cv-768-AC, 2014 U.S. Dist. LEXIS
27 51187, at *33-35 (D. Or. Apr. 11, 2014); *Unico Am. Corp. v. Crusader Captive Servs.*
28 *LLC*, Case No. 06-CV-231, 2006 U.S. Dist. LEXIS 60719, at *5-6 (N.D. Ill. Aug. 11,

1 2006).

2 Here, Defendants have failed to demonstrate good cause for the “Highly
3 Confidential” designation they seek. “If information or documents are to be withheld
4 from a party or client’s review, then there must be an extremely well-defined reason for
5 the withholding (i.e., the specific harm that would result based upon the type of
6 document) and the group of documents to be withheld must be narrowly defined.”
7 *Dysthe v. Basic Research, L.L.C.*, No. CV 09-08013 AG (SSx), 2011 U.S. Dist. LEXIS
8 36754, at *5 (C.D. Cal. Apr. 5, 2011); *see also Ragland*, 2013 U.S. Dist. LEXIS 99369,
9 *7 (“[A]ny party seeking ‘attorneys’ eyes only’ protection will have to . . . demonstrate
10 for each item of material why that extreme restriction upon disclosure is justified,
11 including setting forth the specific legal basis for the claim of confidentiality, a
12 demonstration that the strict criteria for imposition of this designation have been
13 satisfied, and a demonstration that less-restrictive alternatives will not provide adequate
14 protection.”). Defendants’ protective falls well short of this stringent standard. Section
15 2.4 of the protective order defines “Highly Confidential” information only as “extremely
16 sensitive ‘Confidential Information or Items,’ including *but not limited to* contract
17 negotiations, rates, revenue and subscriber numbers, and contract terms, the disclosure
18 of which to another Party or Non-Party would create a substantial risk of serious harm
19 that could not be avoided by less restrictive means.”¹¹ (Emphasis added.) This open-
20 ended definition is vastly overbroad because it does not clearly identify the specific
21 documents or even the general categories of documents Defendants believe require this
22 extreme level of protection. *See Dysthe*, 2011 U.S. Dist. LEXIS 36754, at *3 (stating
23 that “A protective order must be narrowly tailored and cannot be overbroad. Therefore,
24 the documents, information, items or materials that are subject to the protective order
25 shall be described in a meaningful, specific and narrow fashion,” and holding that a list

26 ¹¹ Defendants added these categories only in response to Plaintiff’s repeated assertions
27 that the protective order failed to establish good cause. By adding the phrase “including
28 but not limited to,” however, they rendered this phrase open-ended and thus nugatory for
the purpose of demonstrating good cause.

1 of categories preceded by the phrase “including but not limited to” failed to demonstrate
2 good cause justifying even a confidential designation).

3 Equally problematic is Defendants’ failure to identify the “substantial risk of
4 harm” they believe would result if documents could only be designated “Confidential.”
5 Defendants have never provided Plaintiff with any particularized showing demonstrating
6 a risk of harm, let alone a *substantial* risk of *serious* harm, arising from the disclosure of
7 such documents. *See EQ Okla., Inc. v. A Clean Env’t Co.*, No. 11-CV-510-GKF-PJC,
8 2012 U.S. Dist. LEXIS 159571, at *4-5 (N.D. Okla. Nov. 7, 2012) (“[A]ll ACE has done
9 is alleged that ‘sensitive trade material’ should not be disclosed because of ‘potential
10 injury.’ Other than a generic and broad reference to financial information, ACE has not
11 identified what ‘sensitive trade material,’ if any, exists, or what the ‘potential injury’
12 could be. ACE’s mere conclusory and stereotyped statements do not satisfy ACE’s
13 burden under Rule 26.”).

14 Defendants’ failure to explain why the harm it seeks to avoid could not be avoided
15 through less restrictive means, such as a “Confidential” designation, is particularly
16 problematic in light of the fact that the contracts (and thus the trade secrets they
17 purportedly contain) at issue in this case were negotiated three years ago and the
18 information they contain is likely stale. Nor is there any evidence that any of the
19 individuals who would be made subject to the protective order would not abide by its
20 terms. *See DeFazio*, 2007 U.S. Dist. LEXIS 98147, at *8-9 (“[A] good bit of the
21 information to be produced in this case, and which in all probability will be designated
22 ‘attorneys’ eyes only’ will be historical in nature, i.e., of not much interest to a
23 competitor who is primarily interested in the ‘now.’ Finally, the court has no reason to
24 find at this time that plaintiffs lack the integrity to adhere to this protective order.”);
25 *MGP Ingredients*, 245 F.R.D. at 502 (“The protective order requires almost all persons
26 who are granted access to confidential information to sign an agreement stating that they
27 have read the protective order and that they agree not to use, permit the use of, or
28 disclose to anyone else the confidential information for any purposes other than this

1 lawsuit. Thus, the risk of anyone abusing his or her knowledge of confidential
2 information appears to be small.”).¹²

3 The cases Defendants have cited to Plaintiff during the Parties’ meet and confer
4 are clearly distinguishable and further underscore why a “Highly Confidential”
5 designation is inappropriate here. Defendants’ cases support the proposition that this
6 extreme remedy is sometimes appropriate in cases in which the receiving party is the
7 producing party’s direct competitor. *See Nuratech, Inc. v. Syntech (SSPF) Intern., Inc.*,
8 242 F.R.D. 552, 555 (C.D. Cal. Mar. 20, 2007) (approving use of “attorney’s eyes only”
9 designation in case against direct competitor); *Pinterest, Inc. v. Pintrips, Inc.*, No. 13-cv-
10 04608-RS (KAW), 2014 U.S. Dist. LEXIS 149497, at *8 (N.D. Cal. Oct. 21, 2014)
11 (same); *Whitney v. Wurtz*, No. C 04-5232 PVT, 2007 WL 484788, at *1 (N.D. Cal. Feb.
12 9, 2007) (denying plaintiffs’ motion to permit plaintiffs, who were former employees of
13 the defendant and current employees of a direct competitor, to view documents
14 designated as attorneys’ eyes only because plaintiffs did not need to see the information
15 for their counsel to effectively use the information in the case); *compare Medtronic*,
16 2002 U.S. Dist. LEXIS 27981, at *15 (denying attorney’s eyes only designation and
17 stating that “Finally, unlike many of the cases relied upon by Medtronic, including *Safe*
18 *Flight*, Karlin and Dr. Michelson are not directly in competition with Medtronic.”).

19 Here, a Highly Confidential designation is inappropriate because Plaintiff is not
20 Defendants’ direct competitor: he is unemployed, and thus does not compete with
21 anyone. Defendants’ asserted belief that Plaintiff *may, someday* become Defendants’
22 direct competitor is speculative and falls short of the particularized and concrete

23
24 ¹² Although Defendants may argue that Plaintiff’s prior whistleblowing demonstrates a
25 likelihood that he will breach the terms of the protective order, any such assertion would
26 not be well taken. Plaintiff has alleged a claim under § 1102.5(b) of the California
27 Labor Code, a statute which protects the disclosure of conduct that an employee
28 reasonably believes to be unlawful. Plaintiff’s whistleblowing regarding Starz’s
unlawful conduct provides no basis for concluding that he will disregard a *court order*
limiting disclosure of information Defendants provide in *satisfaction of their legal*
obligation to produce discoverable information in this case.

1 showing required by Rule 26(b). *See Phillips*, 307 F.3d at 1210-11; *Dysthe*, 2011 U.S.
2 Dist. LEXIS 36754, at *5. Moreover, Plaintiff has repeatedly offered to meet and confer
3 to identify any potential deposition witnesses who are direct competitors of Defendants
4 so that they protective order could specifically preclude them from viewing “Highly
5 Confidential” materials, but Defendants have refused to do so. Olney Decl. ¶¶ 22, 25. In
6 fact, courts deny the use of Highly Confidential designations even in cases that do
7 involve direct competitors where the need for such as an extreme remedy has not been
8 clearly demonstrated. *See Frees*, 2007 U.S. Dist. LEXIS 4343, at *14-17 (denying two-
9 tiered protection scheme even where moving party was plaintiff’s direct competitor).

10 Here, not only have Defendants failed to articulate the need for a “Highly
11 Confidential” designation, but any need is clearly outweighed by the prejudice this level
12 of secrecy would cause Plaintiff’s case. Plaintiff, who has vast industry-specific
13 knowledge on topics including the negotiation of Starz’s contracts, would be unable to
14 assist his counsel in analyzing technical documents regarding these negotiations and
15 other topics requiring detailed industry-specific knowledge to properly interpret.
16 Although counsel could seek to retain experts to perform this role, this would greatly
17 increase the cost of this litigation. Moreover, the two-tiered designation system would
18 preclude Plaintiff’s counsel from using “Highly Confidential” documents at deposition
19 to, among other things, elicit testimony, refresh recollection, and impeach witnesses.
20 Defendants’ assertion during the meet and confer that individuals who did not author,
21 receive, or have prior knowledge of the documents’ contents would be unable to offer
22 admissible testimony is factually incorrect, because such witnesses might still have
23 personal knowledge about issues to which the document refers. Defendants also apply
24 the incorrect standard to deposition testimony, which need be only reasonably calculated
25 to *lead to* the discovery of admissible evidence. *Oppenheimer Fund*, 437 U.S. at 351-
26 52.

27 Finally, the protective order’s provision in § 6 for challenging confidentiality
28 designations does not render the “Highly Confidential” classification any less

1 problematic. Courts have frequently recognized that open-ended protective orders such
2 as the one sought by Defendants lead to over-designation. *See Meharg v. Astrazeneca*
3 *Pharms.*, No.1:08-cv-184-DFH-TAB, 2009 U.S. Dist. LEXIS 83847, 2009 WL
4 2960761, at *1 (S.D. Ind. Sept. 14, 2009) (noting the practice of many counsel to over
5 designate discovery responses as confidential); *DeFazio v. Hollister, Inc.*, No. Civ-5-04-
6 1358, 2007 U.S. Dist. LEXIS 98147 (E.D. Cal. Sept. 5, 2007), at *8 (“[T]he very real
7 specter of over-designation of ‘attorneys’ eyes only’ information exists, and plaintiffs
8 should not be put in a position where they are essentially kept in the dark about the
9 important facts of the case.”).¹³ Here, Defendants have already demonstrated an intent to
10 over-designate. On February 21, Starz served its responses to Plaintiff’s First Set of
11 RFPs in which they stated that *they are withholding every single responsive non-ESI,*
12 *non-privileged document* on the ground that no protective order has been entered in this
13 case, indicating its intention to engage in the wholesale designation of every one of these
14 documents as either “Confidential” or “Highly Confidential.” Olney Decl. ¶ 30, Ex. 28.

15 In light of Defendants’ demonstrated track record of over-designation, this
16 provision simply increases the likelihood of future disputes requiring judicial
17 intervention. *See Ragland*, 2013 U.S. Dist. LEXIS 99369, at *5-6 (D.N.D. June 25,
18 2013) (“[T]he court believes that the proposed two-tiered designation of material as
19 either ‘confidential’ or ‘attorneys’ eyes only’ is likely in this case to lead to more
20 disputes that will need to be resolved by the court rather than less.”); *Unico Am. Corp.*,
21 2006 U.S. Dist. LEXIS 60719, at *4 (“It has been this Court’s experience that two-tiered
22

23 ¹³ *See also Keen v. Nestle Waters N. Am., Inc.*, No. 1:10-cv-1075-LJM-TAB, 2011 U.S.
24 Dist. LEXIS 148874, at *2 (S.D. Ind. Dec. 28, 2011); *Ubiquiti Networks, Inc. v. Kozumi*
25 *USA Corp.*, No. 12-cv-2582 CW (JSC), 2013 U.S. Dist. LEXIS 27828, at *9 (N.D. Cal.
26 Feb. 28, 2013) (stating that “Defendants overused the AEO designation”); *Scentsy, Inc.*
27 *v. B.R. Chase, L.L.C.*, No. 1:11-cv-00249, 2012 U.S. Dist. LEXIS 143633, at *11-15 (D.
28 Idaho Oct. 2, 2012) (finding that all 43 documents challenged by plaintiff were
improperly designated); *Brandt Industries, Ltd. v. Pitonyak Machinery Corp.*, No. 1:10-
cv-0857, 2012 U.S. Dist. LEXIS 121214, at *6-10 (S.D. Ind. Aug. 27, 2012) (holding
document was improperly designated as attorneys’ eyes only).

1 protective orders can be confusing and frequently invite nonproductive satellite
2 litigation.”). For all of these reasons, Plaintiffs request that the Court modify the Parties’
3 protective order to remove the Highly Confidential designation.

4 In the event that the Court declines to remove the Highly Confidential
5 designation, Plaintiff requests the following alternative modifications, each of which he
6 proposed to Defendants prior to bringing the instant motion:

- 7 • Require Defendants to identify all of the individuals authorized to view a
8 document designated as “Highly Confidential” pursuant to § 7(b)(6) of the
9 protective order filed on February 27 (providing access to “the author or
10 recipient of a document containing the information or a custodian or other
11 person who otherwise possessed or knew the information”) and their contact
12 information within 3 days of any request;
- 13 • Shorten the time necessary to bring any motion challenging over-designations
14 pursuant to § 6; and
- 15 • Require that the Designating Party be the moving party in any such motion
16 pursuant to § 6.

17 **II. Defendants’ Argument**

18 **A. The Court Should Not Modify The Stipulated Protective Order.**

19 The Court has already entered a stipulated protective order in this case (the
20 “Protective Order”). (Dkt. No. 103.) It contains terms that are uncontroversial for
21 protective orders, and was the result of significant negotiation between the parties.
22 Plaintiff asks the Court to remove the portion of the Protective Order providing for the
23 designation of “Highly Confidential” information. The Court should decline to do so.
24 Discovery in this case will involve significant financial information that constitutes
25 Starz’s most valuable trade secrets and which need Highly Confidential protection.
26 (Declaration of Kevin Cross (“Cross Decl.”) ¶¶ 4-10.) Plaintiff seeks the ability to
27 disclose this information to witnesses who were never previously aware of it, who could
28 then use that information competitively against Starz. Plaintiff’s motion should be

1 denied.

2 **1. The Ninth Circuit Has Approved Two-Tier Protective Orders**
3 **Like The One In Place In This Case.**

4 The leading Ninth Circuit decision regarding two-tier protective orders is *Brown*
5 *Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1470 (9th Cir. 1992) (noting that the
6 decision established Circuit law because “[w]e have not previously determined when
7 protective orders for trade secrets may be appropriate.”). Plaintiff cites it only in passing
8 with a “*see also*” citation and the parenthetical “balancing the interests.” Plaintiff’s
9 attempt to gloss over the decision is unsurprising since, in that case, the Ninth Circuit
10 not only discussed the circumstances in which such orders are appropriate, but also
11 expressly affirmed the issuance of a two-tier protective order.

12 *Brown Bag Software* held that issuance of a two-tier protective order depends on a
13 balancing test in which the court “must balance the risk to [defendant] of inadvertent
14 disclosure of its trade secrets to competitors against the risk to [plaintiff] that protection
15 of [defendant’s] trade secrets impaired prosecution of [plaintiff’s] claims.” *Id.* The
16 Ninth Circuit concluded that a two-tier protective order “strikes a reasonable balance
17 between those interests by shielding [plaintiff’s] in-house counsel from personal
18 knowledge of a competitor’s trade secrets, but allowing access to information through an
19 independent consultant.” *Id.* at 1471. In reaching that conclusion, the Ninth Circuit
20 rejected the plaintiff’s argument that the two-tier protective order prevented the plaintiff
21 from prosecuting the case, noting that its counsel was able “to study the trade secrets”
22 and “develop any admissible evidence it could.” *Id.*

23 Similar to here, the Ninth Circuit “stress[ed] that [plaintiff] failed to demonstrate
24 how the protective order actually could have or did prejudice its case.” *Id.* at 1472.
25 “[Plaintiff] never attempted to implement the independent consultant method of access
26 to the trade secrets and never argued the method was unduly burdensome.” *Id.* “Instead,
27 [plaintiff] alleged its unfettered right to the discovery documents and complained of
28 arbitrary discrimination against in-house counsel.” *Id.* “[Plaintiff’s] arguments are

1 unsubstantiated.” *Id.* Thus, the Ninth Circuit affirmed issuance of the two-tier
2 protective order.

3 The result should be the same here. On the one hand, Plaintiff offers no
4 evidentiary showing that a two-tier protective order would prejudice his prosecution of
5 this case. Plaintiff makes a general legal argument about the burdens that a two-tier
6 protective order imposes. Plaintiff supports that legal argument with quotations and
7 citations to a number of cases. That is insufficient. There is plenty of language in
8 *Brown Bag Software* (and other cases cited by Plaintiff) that discusses that burden. But
9 as the Ninth Circuit made clear in *Brown Bag Software*, the plaintiff must make a
10 concrete showing of burden, supported by admissible evidence—not, as Plaintiff has
11 done here, simply argue about it.

12 On the other hand, Defendants have made a detailed evidentiary showing of the
13 risk that their trade secrets will be disclosed if the Court modifies the protective order in
14 the manner that Plaintiff requests. Among other things, Starz’s contract negotiations
15 (including internal discussions about how to approach a negotiation and external
16 communications with those affiliates) need protection from public disclosure. (Cross
17 Decl. ¶ 4.) Public release of information regarding strategies Starz uses when
18 negotiating its affiliate agreements would harm Starz’s ability to implement these similar
19 strategies during future negotiations. (*Id.*) Every affiliate has a unique “carriage” deal
20 structure. (*Id.* ¶ 5.) Sharing the terms of these deals and the negotiation of those terms
21 with Starz’s other affiliates, who are not parties to that agreement, will harm Starz’s
22 ability to negotiate the best possible terms in future carriage negotiations and future
23 marketing and promotions negotiations. (*Id.*) Due to the nature of these affiliate sales
24 agreements, the risk of harm to Starz is ongoing and severe if these agreements were
25 disclosed publicly, to any affiliate, to any person who is likely to be employed by an
26 affiliate in the future, to any competitor, or to any person who is likely to compete with
27 Starz in the future. (*Id.* ¶ 6.) Financial data concerning revenues, profits, expenses,
28 losses, profit margins, and subscriber information also requires protection. (*Id.* ¶ 8.)

1 These facts are described in far greater detail in the declaration of Kevin Cross, a Senior
2 Vice President in Starz’s Business and Legal Affairs Department. (*Id.* ¶¶ 4-10.)

3 The difference between Plaintiff’s *argument* and Defendants’ *evidentiary showing*
4 is laid bare in Plaintiff’s assertion that “the contracts (and thus the trade secrets they
5 purportedly contain) at issue in this case were negotiated three years ago and the
6 information they contain is likely stale.” Plaintiff offers no evidence in support of his
7 assertion that Defendants’ trade secrets are not valuable. He just pulls “likelihood” out
8 of thin air. Worse, he effectively asks this Court to conclusively hold that Defendants’
9 trade secrets are not valuable, based on his speculation alone, and therefore modify the
10 protective order so that it no longer protects those trade secrets. By contrast, Defendants
11 have submitted actual evidence that contracts negotiated three years ago are among
12 Starz’s most valuable trade secrets. (Cross Decl. ¶ 4.) The contracts are negotiated for
13 terms of multiple years, which in many cases will make a three-year-old contract the
14 current or most recent contract. (*Id.* ¶ 5.) In future negotiations, it would be highly
15 detrimental to Starz (and highly advantageous to the parties with which it contracts) if
16 one contract’s terms were disclosed to third parties, who could then use that information
17 to negotiate more favorable terms for their own contracts. (*Id.*) Unlike Plaintiff,
18 Defendants do not just offer speculation about whether Starz’s trade secrets are
19 valuable—Defendants offer evidence that they are.

20 Notably, in arguing that Starz’s trade secrets are unworthy of this type of
21 protection, Plaintiff is forced to talk out of both sides of his mouth. In his operative
22 complaint, Plaintiff alleged that when a former employee of DIRECTV with access to
23 this type of information joined Starz’s Board of Directors, the mere fact that he had
24 knowledge of it somehow disqualified him from working in any capacity for Starz.
25 (Carter Decl., Exh. B at ¶ 24.) Yet Plaintiff now is so unconcerned about this same type
26 of information that he not only argues that former Starz employees should be permitted
27 to join affiliates or competitors, but that Starz should be unable to designate this type of
28 information as Highly Confidential to prevent them from seeing it. The truth lies in the

1 middle of Plaintiff's two extremes: employees can change jobs, but the former employer
2 should be entitled to take appropriate measures to protect its trade secret and confidential
3 information.

4 In short, Defendants have made an evidentiary showing that supports maintaining
5 the currently-existing Protective Order in this case without modification. Plaintiff has
6 made no evidentiary showing that the protective order is unjustified or that it would
7 prejudice his prosecution of this case. Accordingly, the balancing required by the Ninth
8 Circuit's decision *Brown Bag Software* is easy: the evidence weighs entirely in favor of
9 maintaining the Protective Order without modification, and Plaintiff's motion to modify
10 it should be denied.

11 **2. Plaintiff's Authorities Confirm That Two-Tier Protective Orders**
12 **Should Issue To Protect Confidential Business Information.**

13 Plaintiff offers a long, unexplained string cite of ten out-of-state cases that
14 supposedly support his assertion that "[b]ecause protective orders containing a 'Highly
15 Confidential' [sic] are so disruptive to a plaintiff's case, courts routinely deny them . . ."
16 In fact, they do not.

17 Of the ten decisions cited by Plaintiff as "routinely deny[ing]" a two-tier
18 protective order, only one comes from within the Ninth Circuit, and it is directly
19 contrary to Plaintiff's argument: *Wanke Cascade Distrib. v. Forbo Flooring, Inc.*, No.
20 3:13-cv-768-AC, 2014 U.S. Dist. LEXIS 51187, at *33-35 (D. Or. Apr. 11, 2014).
21 Despite Plaintiff's mischaracterization of the case, *Wanke* actually entered a two-tier
22 protective order. *Wanke* cited and incorporated by reference the Ninth Circuit's
23 standards set forth in *Brown Bag Software*, *id.* at *3, and held: "The Court finds good
24 cause exists to enter a two-tier protective order that permits the parties to designate
25 documents as either 'Confidential' or 'Attorney's Eyes Only.'" *Id.* at *2. In other
26 words, *Plaintiff falsely cited Wanke as a case in which a motion for a two-tier protective*
27 *order was denied, when in fact it was granted.* Of course, mistakes happen.
28 Significantly, however, this is not the only one.

1 Plaintiff also cites *Medtronic Sofamor Danek, Inc. v. Michelson*, No. 01-2373-GV,
2 2002 U.S. Dist. LEXIS 27981, at *14-16 (W.D. Tenn. Jan. 30, 2002), as “routinely
3 deny[ing]” a two-tier protective order, but again that Court granted one. Notably, even
4 though the District Court in that case was in the Sixth Circuit, it cited the “the balancing
5 test set forth in *Brown Bag Software*,” and held that “information will be designated as
6 ‘attorneys’ eyes only’ and may be viewed only by the persons specified in the court’s
7 Protective Order that qualify under that tier.” *Id.* at *17. Strike two for Plaintiff.

8 Plaintiff also cites *Burris v. Versa Products, Inc.*, No. 07-3938, 2013 U.S. Dist.
9 LEXIS 21851, at *7-8 (D. Minn. Feb. 19, 2013), as “routinely deny[ing]” a two-tier
10 protective order, but that is not really true either. In *Burris*, “[t]he parties did not even
11 ask for the right to produce certain information under a ‘Confidential Attorney’s Eyes
12 Only’ designation.” *Id.* at *8. Since no one even requested a two-tier protective order, it
13 should go without saying that the Court did not rule on the issue. Strike three.

14 Some of the cases cited by Plaintiff actually did deny a request for a two-tier
15 protective order, but none of them provides any support for modifying the current
16 Protective Order in the circumstances of this case. For example, in *EQ Oklahoma, Inc.*
17 *v. A Clean Env’t Co.*, No. 11-CV-510-GKF-PJC, 2012 U.S. Dist. LEXIS 159571, at *3-5
18 (N.D. Okla. Nov. 7, 2012), the court denied an application for a two-tier protective order
19 where the defendant “provided **no** evidentiary support to this Court. Nor did ACE
20 articulate any legal argument and cited to **no** legal support for its position.” *Id.* at *3
21 (emphasis in original). By contrast here, Defendants have provided a declaration
22 containing evidentiary support, articulated legal arguments, and cited to Ninth Circuit
23 authority in support their position. Most of the other decisions cited by Plaintiff are to
24 the same effect: *Arvco Container Corp. v. Weyerhaeuser Co.*, No. 1:08-cv-548, 2009
25 U.S. Dist. LEXIS 9264 (W.D. Mich. Feb. 9, 2009); *Dorchen/Martin Assoc., Inc. v.*
26 *Brook of Cheboygan*, No. 11-10561, 2012 U.S. Dist. LEXIS 73791 (E.D. Mich. May 29,
27 2012); *Ragland v. Blue Cross Blue Shield of N.D.*, No. 1:12-cv-080, 2013 U.S. Dist.
28 LEXIS 99369 (N.D. D. June 25, 2013); and *Unico Am. Corp. v. Crusader Captive Servs.*

1 *LLC*, Case No. 06-CV-231, 2006 U.S. Dist. LEXIS 60719 (N.D. Ill. Aug. 11, 2006).
2 The fact that parties in those cases made no effort to support an application for a
3 protective order with any factual or legal showing is irrelevant here, and provides no
4 support for Plaintiff's argument that courts routinely deny two-tier protective orders
5 because they "are so disruptive to a plaintiff's case."

6 Of the ten decisions cited by Plaintiff, only four involved robust discussion by the
7 parties and the courts: *Wanke* and *Medtronic*, which as discussed above actually granted
8 two-tier protective orders, *Frees, Inc. v. McMillian*, No. 05-1979, 2007 U.S. Dist.
9 LEXIS 4343, at *14-16 (W.D. La. Jan. 22, 2007), and *MGP Ingredients, Inc. v. Mars,*
10 *Inc.*, 245 F.R.D. 497, 500-502 (D. Kan. 2007). A review of the latter decisions,
11 however, makes clear that the reasons for denying a two-tier protective order in those
12 cases simply do not exist here. *Frees* and *MGP* both involved highly specialized
13 technical trade secrets. In *Frees*, the court found that review of confidential documents
14 by the parties was absolutely essential because they were the only ones who could
15 understand and interpret it for the attorneys: "Frees' trial counsel are not likely to have
16 such expertise. Therefore, if Frees' personnel were not allowed to review the discovered
17 information, Frees would be forced to hire an outside consultant which, as Frees points
18 out, would not only be very expensive, but also very difficult because, according to
19 Frees, no experts currently have the particularized knowledge of Frees' technology
20 necessary to properly evaluate the Southeast documents." *Frees*, 2007 U.S. Dist. LEXIS
21 4343 at *15-16. Similarly, in *MGP*, the court cited *Frees* and held that a protective
22 order should be denied because the parties' "in-house personnel have substantial
23 experience in a narrow field that cannot be replaced in the 'open market.'" *MGP*
24 *Ingredients*, 245 F.R.D. at 502.

25 Unlike *Frees* and *MGP*, this case does not involve technical trade secrets at all—
26 much less technical trade secrets that are so specialized that not even experts can
27 understand them, necessitating their review by the parties themselves. Thus, *Frees* and
28 *MGP* provide no support for Plaintiff's argument.

1 Significantly, the distinction between specialized technical trade secrets and trade
2 secrets involving confidential financial and business information was expressly
3 addressed by the Court in *Medtronic*—which, again, is one of the cases cited by
4 Plaintiff. In that case, one of the questions presented was whether one of the parties, Dr.
5 Michelson, should be permitted access to certain technical information. Because “all the
6 technology at issue was created by Dr. Michelson,” the Court held that he was “uniquely
7 qualified” to review it and that “the danger of Dr. Michelson abusing his knowledge of
8 confidential information is small, as he was the inventor of the technology behind the
9 spinal implants manufactured by Medtronic.” *Medtronic Sofamor Danek*, 2002 U.S.
10 Dist. LEXIS 27981, at *14-15. “In contrast to the spinal fusion technology, Medtronic’s
11 financial and marketing data stands on a different footing . . . there is no reason for Dr.
12 Michelson to have access to this information.” *Id.* at *16. Thus, the Court entered a
13 two-tier protective order for the financial information. The result should be the same
14 here for three reasons.

15 First, this case, like *Wanke* and *Medtronic* and unlike *Frees* and *MGP*, involves
16 financial information rather than technical information. (Cross Decl. ¶¶ 4-10.) Like in
17 *Wanke* and *Medtronic* and unlike in *Frees* and *MGP*, neither Plaintiff nor the third-party
18 deponents to whom he seeks to disclose Defendants’ Highly Confidential Information is
19 “uniquely qualified” to review that information. *See, e.g., Medtronic Sofamor Danek*,
20 2002 U.S. Dist. LEXIS 27981, at *17. Because of the type of information at issue, a
21 Highly Confidential designation is appropriate.

22 Second, as *Wanke* and *Medtronic* make clear, just because some information may
23 not ultimately be subject to Highly Confidential protection is not a reason to deny entry
24 of a two-tier protective order entirely. In *Medtronic*, the Court held that even though
25 some information could not be designated as attorneys’ eyes only, a two-tier protective
26 order should be entered because other information could. In *Wanke*, the Court deferred
27 consideration of which information should be attorneys’ eyes only for another day,
28 holding that “because the protective order the court will enter provides a procedure for

1 removing the AEO designation, Forbo's concerns are adequately addressed and balanced
2 against Wanke's interests in safe-guarding its competitively sensitive information."
3 2014 U.S. Dist. LEXIS 51187, at *8.

4 The result should be the same here: the Court should leave the two-tier protective
5 order in place as it currently exists. If Plaintiff objects to particular designations of
6 information as Highly Confidential, he can present those objections on a case-by-case
7 basis. But his attempt to modify the protective order itself fails—ironically, even under
8 Plaintiff's own authorities. Comparing *Wanke* and *Medtronic* with *Frees* and *MGP* is
9 not even a case of comparing Plaintiff's cases with Defendants'. All four of those
10 cases—and, indeed, all of the cases cited in this section of the Stipulation—were
11 affirmatively relied upon by Plaintiff. They simply do not say what Plaintiff claims they
12 do. If Plaintiff cannot make a showing that the Protective Order should be modified
13 even under his own authorities—which ignore the Ninth Circuit's seminal decision in
14 *Brown Bag Software*—it is clear that his request to modify the Protective Order should
15 be denied.

16 Third, the "Highly Confidential" provision in the Protective Order in this case is
17 far more limited than in the authorities cited by Plaintiff: it is not strictly an attorneys'
18 eyes only provision. Plaintiff asserts that "the protective order limits disclosure of
19 'Highly Confidential' documents to Plaintiff's counsel and experts. (*supra*, p.34). As a
20 result, counsel may not show such documents to Plaintiff himself or to deposition
21 witnesses." That is untrue. The Protective Order permits disclosure of Highly
22 Confidential information to *seven categories of recipients* including, as most relevant
23 here, "the author or recipient of a document containing the information or a custodian or
24 other person who otherwise possessed or knew the information." (Olney Decl., Ex. 24 §
25 7(b)).

26 In other words, the Highly Confidential provision is significantly less restrictive
27 than the "attorneys' eyes only" provisions at issue in the decisions on which Plaintiff
28 relies. Under the existing Protective Order, if Plaintiff was an author or recipient of a

1 Highly Confidential document, he can view it. Similarly, if a deposition witness was an
2 author or recipient of a Highly Confidential document, he or she can view it. This was
3 already a significant concession on Defendants' part. Indeed, in many of the cases on
4 which Plaintiff relies, the issue is merely whether to allow such recipients access to the
5 documents, which Defendants have already stipulated to here.

6 By contrast, Plaintiff's requested removal of the Highly Confidential provision
7 would permit distribution of such documents to Plaintiff and to deposition witnesses
8 even if they never sent or received the documents. In other words, it would permit
9 disclosure of Highly Confidential documents to people with no personal knowledge of
10 their contents under the guise of questioning them in discovery—even though they have
11 no personal knowledge. Even Plaintiff appears to recognize how egregious that is when
12 he states: "Plaintiff has repeatedly offered to meet and confer to identify any potential
13 deposition witnesses who are direct competitors of Defendants so that they [sic]
14 protective order could specifically preclude them from viewing 'Highly Confidential'
15 materials." Yet how would the parties even identify Highly Confidential materials
16 without being able to designate them as such under the Protective Order? In other
17 words, Plaintiff wants the Court to modify the Protective Order to remove the structure
18 by which Defendants can protect their Highly Confidential information, and then trust
19 Plaintiff to provide some additional consideration on an ad-hoc basis. Such an
20 arrangement would be unprecedented and unfair.

21 **3. Courts Consistently Approve Two-Tier Protective Orders For**
22 **Confidential Business Information Like That At Issue Here.**

23 Plaintiff's own authorities so clearly support imposition of a two-tier protective
24 order that discussion of additional authorities seems superfluous. Since only one of
25 Plaintiff's ten authorities is within the Ninth Circuit (and, notably, entered a two-tier
26 protective order), however, it is worth noting that courts within the Ninth Circuit
27 routinely enter two-tier protective orders in circumstances similar to those here.

28 For example, *Campbell v. PricewaterhouseCoopers, LLP*, 642 F.3d 820, 822 n.1

1 (9th Cir. 2011), is an employment action in which the court issued a “protective order
2 allowing [the parties] to designate certain material as ‘Confidential’ or ‘Highly
3 Confidential’ and file it under seal.” Thus, to the extent that Plaintiff argues that trade
4 secrets can only be protected in trade secret cases, and not in employment actions, he is
5 clearly wrong. Trade secrets must be protected in every type of case, and they have
6 specifically been protected by the Ninth Circuit in employment actions. *See id.* (“We are
7 mindful of PwC’s interest in protecting its proprietary business information.”); *see also*
8 *Walton v. K-Mart, Inc.*, No. C07-0707 PJH (BZ), 2007 WL 4219395, at *2 (N.D. Cal.
9 Nov. 28, 2007) (ordering the parties in a single plaintiff employment dispute to enter
10 into an attorneys’ eyes only protective order).

11 In *Omega S.A. v. Costco Wholesale Corp.*, No. CV 04-5443-TJH (RCx), 2005 WL
12 6411417, at *2–3 (C.D. Cal. June 8, 2005), the Court expressly rejected a plaintiff’s
13 claim that a lesser protective order would suffice. In that case, the court had entered a
14 two-tier protective order in which “highly confidential” documents could be viewed by
15 counsel and the parties’ representatives. *Id.* at *2. The defendant moved to modify the
16 protective order so that “highly confidential” documents could only be viewed by
17 counsel. *Id.* Balancing the parties’ interests as required by *Brown Bag Software* and
18 relying on a declaration by an employee of the defendant regarding the value of the
19 information, the Court held that the protective order should be modified to protect the
20 defendant’s “commercial information” from disclosure to party representatives. *Id.*

21 Indeed, in contrast to Plaintiff’s failure to cite a single decision from within the
22 Ninth Circuit in which a two-tier protective order has been denied, courts in this Circuit
23 routinely issue such orders. *See, e.g., Oracle Am., Inc. v. Google Inc.*, No. 10-cv-03561-
24 WHA (DMR), 2016 WL 674368, at *1-2 (N.D. Cal. Feb. 19, 2016) (explaining that
25 Highly Confidential designations protect the disclosure of businesses’ confidential
26 information); *Advanced Visual Image Design, LLC v. Exist, Inc.*, No. EDCV 14-2525-
27 JGB (KKx), 2015 WL 4934178, at *7 (C.D. Cal. Aug. 18, 2015) (ordering the
28 production of financial documents to be designated confidential or highly confidential as

1 appropriate, pursuant to the protective order); *M.G. v. Metro. Interpreters & Translators,*
2 *Inc.*, No. 12cv0460-JM (MDD), 2014 WL 5494910, at *2 (S.D. Cal. Oct. 30, 2014)
3 (ordering the production of financial documents pursuant to “the outstanding Protective
4 Order . . . and classified as ‘attorneys eyes only.’”); *AFMS LLC v. United Parcel Serv.*
5 *Co.*, No. 12cv1503 JLS (NLS), 2012 WL 3112000, at *2 (S.D. Cal. July 30, 2012)
6 (permitting a protective order with a highly confidential designation thus limiting AEO
7 documents to only outside counsel, specifically named in-house counsel at defendants,
8 experts, the court and its staff, litigation support vendors, and the author or recipient of
9 the document or the original source of the information); *Couch v. Wan*, No. 1:08cv1621
10 LJO DLB, 2011 WL 4474396, at *2 (E.D. Cal. Sept. 26, 2011) (ordering the “existing
11 protective order [to] be modified to include an ‘Attorneys’ Eyes Only’ provision, which
12 allows the designated documents to be disclosed to the authors of the documents, expert
13 witnesses and persons identified by the documents as having previously seen the
14 documents.”); *CytoSport, Inc. v. Vital Pharm., Inc.*, No. CIV S-08-2632 FCD/GGH,
15 2010 WL 1904840, at *4 (E.D. Cal. May 10, 2010) (denying defendant’s request to
16 modify the protective order to permit in-house counsel (a competitor) to view AEO
17 material because, among other reasons, it offered no evidence that any actual prejudice
18 would be caused by the order); *San Francisco Bay Area Rapid Transit Dist. v. Spencer*,
19 No. C 04-04632 SI, 2006 WL 3050860, at *1 (N.D. Cal. Oct. 23, 2006) (finding that
20 “[d]efendants’ apprehension of the financial records becoming public can be resolved by
21 designating this information as confidential or highly confidential pursuant to the
22 protective order.”).

23 Defendants could provide many more examples, but they grow weary of beating a
24 dead horse. The truth is that the Protective Order in place in this case is routine. That
25 Plaintiff has gone to such extraordinary efforts to attack it reflects nothing but the vitriol
26 with which he has pursued this litigation. Plaintiff does a wonderful job of taking an
27 outlandish position and seemingly supporting it in a reasonable fashion. But he does so
28 by cherry-picking language from out-of-Circuit authorities in a way that both ignores the

1 law of this Circuit and misrepresents the holdings of the cases in which he relies—going
2 so far as to say that two cases denied two-tier protective orders when in fact those cases
3 granted them. To prevent this Court from relying on Plaintiff’s outright
4 misrepresentations, Defendants were required to discuss this issue in far greater detail
5 than it otherwise merited. This is an easy issue to resolve: there is a standard protective
6 order in place, and Plaintiff offers no legitimate reason to modify it.

7 **4. Plaintiff’s Suggested Burden-Shifting Is Unworkable.**

8 Apparently recognizing that he overreaches by attempting to preclude Defendants
9 from designating any material whatsoever as Highly Confidential, Plaintiff alternatively
10 requests that the Court make three other modifications to the Protective Order that would
11 require Defendants to automatically produce additional information when designating
12 materials as Highly Confidential, shorten the time for bringing “any motion challenging
13 over-designations” and require “that the Designating Party be the moving party in any
14 such motion.” Those requests are nonsensical.

15 Plaintiff has never explained how those modifications would work, attempted to
16 justify why they should be made, and offered no authority supporting such
17 modifications—either here or in the meet and confer process. Plaintiff’s throw-away
18 request wholly fails to satisfy his burden to show any reason why the Protective Order
19 should be modified, and it should be denied for that reason alone.

20 The Protective Order in this case is based on this Court’s model protective order,
21 which provides in Section 6.2: “The Challenging Party shall initiate the dispute
22 resolution process under Local Rule 37-1 et seq.” *See* AFM Form Stipulated Protective
23 Order (rev 7-14-16), available at
24 [https://www.cacd.uscourts.gov/sites/default/files/documents/AFM/AD/AFM%20Form%](https://www.cacd.uscourts.gov/sites/default/files/documents/AFM/AD/AFM%20Form%20Stipulated%20Protective%20Order%20%28rev%207-14-16%29.pdf)
25 [20Stipulated%20Protective%20Order%20%28rev%207-14-16%29.pdf](https://www.cacd.uscourts.gov/sites/default/files/documents/AFM/AD/AFM%20Form%20Stipulated%20Protective%20Order%20%28rev%207-14-16%29.pdf).

26 This Court’s model protective order places the burden on the Challenging Party to
27 initiate the dispute resolution process for good reason: to prevent unnecessary disputes
28 before the Court. Plaintiff’s contrary proposal would ensure that this Court would be

1 required to preside over dozens of motions regarding confidentiality designations, if not
2 more. That would create enormous and unnecessary burdens for both the Court and the
3 parties.

4 Given the scope of discovery in this action—more than one million documents to
5 which Defendants have agreed to apply search terms, and more than four million
6 documents to which Plaintiff wants to apply search terms—Defendants may need to
7 designate a significant number of documents as Confidential or Highly Confidential. A
8 great many of those documents may have little or no relevance to the issues in this case.
9 Certainly, the parties cannot present a million documents at trial. The question the Court
10 should answer, then, is whether it really wants to resolve otherwise unnecessary disputes
11 regarding the confidentiality of irrelevant documents. Consider:

12 On the one hand, if the burden is on the party objecting to a confidentiality
13 designation to file a motion with the Court, then that party presumably will only file a
14 motion with respect to documents on which it is truly relying. That should mean a fairly
15 limited number of motions.

16 On the other hand, if the burden is on the designating party to file a motion to
17 support its designation, then the opposing party can claim an intent to rely on as many
18 documents as it wants, forcing the designating party to file motions to protect all of those
19 documents. By removing any cost on the opposing party, such a mechanism all but
20 ensures that this Court will be required to preside over countless unnecessary discovery
21 disputes.

22 To avoid the problems that would be created by granting Plaintiff's unexplained
23 request for a modification of the Protective Order's provisions regarding challenging
24 designations of confidential material, Plaintiff's request should be denied.

25 Similarly, Plaintiff offers no explanation or authority for his request that the Court
26 compel a designating party to provide additional information along with designations of
27 confidential material. Once again, doing so would impose significant burdens on the
28 producing party, as it would be required to conduct exhausting searches for that

1 additional information with respect to innumerable documents that ultimately may have
2 little or no relevance to the case.

3 There is a reason why not only the Court's model order but also the Federal Rules
4 regarding document production in general do not require parties producing documents to
5 concurrently produce explanatory information regarding the documents: doing so would
6 be unduly burdensome. Nothing prevents the party receiving the documents from
7 conducting discovery regarding the documents and requesting information about them, if
8 the document is significant enough to merit such discovery. But there is no basis for
9 compelling a party producing those documents to automatically search for information
10 regarding each and every document that it produces.

11 Accordingly, Plaintiff's request to modify the Protective Order in this case, which
12 is based on this Court's model protective order, should be denied.

13 **B. There Is No Basis For This Court To Order Seizure Of Individuals'**
14 **iPhones and Email Accounts, Especially Without Providing Them A**
15 **Chance To Object.**

16 Plaintiff's request for the *ex parte* seizure of Starz's current and former
17 employees' own, personal smartphones (and other "electronic devices") and email
18 accounts is one of the three remedies that Plaintiff expressly seeks in his conclusion.
19 Yet there is no mention of it in Plaintiff's introduction, which asserts that only two
20 issues are presented. The issue does not receive its own section of Plaintiff's argument.
21 Instead, Plaintiff buries all consideration of the issue in two paragraphs at the end of his
22 discussion of ESI. There is good reason for Plaintiff to hide his request: it is
23 outrageous.

24 Plaintiff correctly states that the Federal Rules of Civil Procedure only require
25 production of relevant material in the "possession, custody, or control" of a party, and
26 that the Ninth Circuit has defined "control" to mean "the *legal right* to obtain documents
27 upon demand." *United States v. Int'l Union of Petroleum & Indus. Workers*, 870 F.2d
28 1450, 1452 (9th Cir. 1989) (emphasis added). Conversely, "[o]rdering a party to

1 produce documents that it does not have the legal right to obtain will oftentimes be
2 futile, precisely because the party has no certain way of getting those documents.” *In re:*
3 *Citric Acid Litigation*, 191 F.3d 1090, 1108 (9th Cir. 1999).

4 Employers do not have any “legal right” to seize employees’ iPhones and search
5 their contents. Because Starz lacks control over its employees’ personal smartphones
6 and other electronic devices, they cannot be part of any production order.

7 Plaintiff asserts that *Miniaice v. Pac. Mar. Ass’n*, No. C 04-03506 SI, 2006 U.S.
8 Dist. LEXIS 17127, at *6 (N.D. Cal. Feb. 13, 2006), somehow supports his assertion that
9 employers have control over employees’ personal electronic devices. It does not.
10 *Miniaice* has nothing to do with employee’s personal electronic devices. *Miniaice* deals
11 with work-related documents in the possession of current employees or directors. It
12 unremarkably holds that the company has “the legal right to obtain documents upon
13 demand” from current directors (though not former directors, over which the company
14 lacks any continuing control). *Id.*¹⁴ No doubt, companies have the right to demand that
15 current employees or directors produce work-related documents. But nothing in *Miniaice*
16 supports Plaintiff’s assertion that companies have the right to demand that employees
17 produce their personal cell phones for inspection. Companies have no such legal right.

18 By contrast, the Court considered the exact issue here in *Kickapoo Tribe of*
19 *Indians v. Nemaha Brown Watershed Joint Dist.* No. 7, 294 F.R.D. 610 (D. Kan. Sept.
20 23, 2013). In *Kickapoo*, just like here, the plaintiff “moved the Court to order forensic
21 mirror imaging of computers and other electronic devices personally owned by current
22 and former District Board members, employees, and staff.” *Id.* at 618. “More
23 specifically, [plaintiff] requests all personal notes, emails, text messages, meeting
24 records, phone logs, documents, and all other materials of any kind requested in RFPs.”
25 *Id.* The Court concluded that, even if those devices contained work-related information

26 ¹⁴ Notably, Plaintiff offers no authority that would permit Starz to produce anything held
27 by former employees, and even *Miniaice* is to the contrary. Accordingly, the numerous
28 custodians who are former Starz employees are not really at issue, and Defendants will
focus on the issues as they pertain to current employees.

1 that might be responsive to the requests, the employer had no power or obligation to
2 produce them because, “as to the personally-owned computers of current Board
3 members, employees, and staff, the Court finds . . . that the District does not have
4 possession, custody, or control of these items.” *Id.*

5 Although employers’ lack of any legal right to demand employees’ personally-
6 owned electronic devices is reason enough to deny Plaintiff’s demand for them,
7 Plaintiff’s demand also implicates significant privacy concerns. The Court in *Kickapoo*
8 continued: “In addition, the Court has significant concerns regarding the intrusiveness
9 of the request and the privacy rights of the individuals to be affected.” *Id.* There is good
10 reason for such concerns. *See Riley v. California*, 134 S. Ct. 2473, 2490 (2014) (“it is no
11 exaggeration to say that many of the more than 90% of American adults who own a cell
12 phone keep on their person a digital record of nearly every aspect of their lives—from
13 the mundane to the intimate.”); *United States v. Cotterman*, 709 F.3d 952, 966 (9th Cir.
14 2013) (making “copies of the hard drives and perform[ing] forensic evaluations” is
15 “essentially a computer strip search.”).

16 Plaintiff fails to cite a single judicial decision permitting a private employer to
17 seize and search employees’ personal cell phones, nor has Defendant found any. If this
18 Court makes such an order, it will not only be the first to do so—it will very likely cause
19 alarm amongst millions of Americans who must suddenly fear that, tomorrow, their
20 employers will suddenly assert “control” over their cell phones. The question is not
21 simply whether Plaintiff can get discovery. The question is whether an employer can
22 violate its employees’ privacy by forcing them to hand over their personal cell phones
23 merely because a single plaintiff demanded it in discovery. The answer must be no.

24 “The Court must therefore deny the request for forensic mirror imaging of
25 computers and other electronic devices personally owned by current and former District
26 Board members, employees, and staff.” *Kickapoo*, 294 F.R.D. at 619; *see also Matthew*
27 *Enterprise, Inc. v. Chrysler Group LLC*, 2015 WL 8482256, *4 (N.D. Cal. Dec. 10,
28 2015) (denying motion to compel production of emails from employees’ personal email

1 accounts because employer did not have any legal right to collect emails from those
2 accounts and therefore had no “control” over them); *Cotton v. Costco Wholesale*
3 *Corporation*, No. 12-2731-JWL, 2013 WL 3819975, at *6 n.25 (D. Kan. July 24, 2013)
4 (denying plaintiff’s motion to compel production, reasoning that because defendant did
5 not issue cell phones to its employees and therefore did not have “a legal right to obtain
6 on demand” text messages that had been sent “from employees’ personal cell phones.”).

7 Plaintiff’s argument that Starz somehow exercises “control” over current (but not
8 former) employees’ personal cell phones and email accounts because it can fire them is a
9 *non sequitur*. The right to terminate employment does not imply the right to seize
10 personal cell phones or email accounts, and the ability to coerce employees in that
11 fashion plays no part in the statutory test. The Ninth Circuit has specifically held that “a
12 theoretical possibility that” a party could “gain access” to documents is “insufficient to
13 give [that party] ‘control’ for purposes of Federal Rule 45(a).” *In re Citric Acid*
14 *Litigation*, 191 F.3d at 1107. “[T]he **legal control** test is the proper standard under Rule
15 45.” *Id.* (emphasis added). Plaintiff’s argument confuses the ability to extort property
16 with a legal right to obtain it. Because employers have no **legal** right to obtain access to
17 current (or former) employees’ personally-owned electronic devices, Plaintiff’s request
18 that this Court order their seizure must be denied.

19 **C. Consideration Of Specific ESI Search Criteria Is Premature Because**
20 **Plaintiff Failed To Meet And Confer In Good Faith.**

21 The parties are still early in the meet and confer process regarding ESI. So early,
22 in fact, that Plaintiff included a never-before-seen proposal in this motion—and then
23 even amended it further after serving this motion. Specifically, on February 27, 2017,
24 Plaintiff sent a revised proposal of ESI search terms embedded in his portion of the joint
25 stipulation to compel production of ESI, among other things. (*See supra*, fn. 4
26 (“Plaintiff has slightly revised his proposals as set forth in the instant motion to expand
27 several proposals [and] narrow others.”)). Plaintiff sent a further revised version of his
28 search term proposal embedded in a revised version of his portion of the joint stipulation

1 on March 1, 2017. (Carter Decl., Exhs. J-K.) In other words, Plaintiff's proposed search
2 terms are in such flux that he felt compelled to change them both at the time of serving
3 this motion and again after serving this motion. That strongly suggests that greater meet
4 and confer efforts were required before bringing this motion.

5 Plaintiff made his first proposal regarding ESI custodians on January 26, 2017—at
6 which time Plaintiff sought documents from an incredible **50 custodians**. (Carter Decl.
7 ¶ 6.) Plaintiff also sought a response within 24 hours, which was not enough time even
8 for Defendants and their counsel even to figure out who these 50 people were. (*Id.* ¶ 8.)
9 Plaintiff describes this as Defendants refusing "to meet and confer quickly." (*Id.* ¶ 9;
10 Olney Decl. ¶ 5.)

11 On February 1, 2017, Defendants proposed an initial ESI search of **6 custodians**—
12 a number that is far more proportional to this single-plaintiff wrongful discharge case.
13 (Carter Decl. ¶ 12.) Not every person who has even the slightest bit of knowledge that is
14 tangentially related to this case should be subject to a massive ESI search. Arguably,
15 only 2 custodians are at the heart of this case—Plaintiff and his supervisor, Thornton,
16 who made the decision to terminate Plaintiff's employment. At 6 custodians,
17 Defendants had already offered more than is really necessary.

18 The next day and again on February 7, the parties conferred regarding ESI
19 discovery. Plaintiff's counsel did not appear to understand certain aspects of ESI
20 review, including that what he was requesting would require Starz to (i) collect tens of
21 millions of documents from its archives (which could take weeks); (ii) migrate that data
22 to software capable of reviewing it (which could also take weeks); (iii) process that data
23 (which could take weeks, if not months); and (iv) run de-duplication software (which
24 could take weeks, if not months). (*Id.* ¶ 14.)

25 Following the meet and confer, Defendants offered several conditional
26 compromises to Plaintiff, even though Defendants believed that adding custodians was
27 unnecessary and unduly burdensome. (*Id.* ¶ 17.) Defendants offered to provide
28 information regarding the size of the data archives once Plaintiff sent revised search

1 terms, custodians, and time frames. (*Id.* ¶ 18.) On February 13, Plaintiff provided that
2 list, and Defendants began working to collect the information. (*Id.* ¶¶ 19, 21.)

3 But just four days later, on February 17, Plaintiff apparently decided that
4 Defendants had not moved fast enough and stated that he intended to bring this motion
5 to compel. (*Id.* ¶ 21.) Defendants stressed that a motion was premature. (*Id.* ¶ 22.)
6 Deciding otherwise, Plaintiff brought this motion.

7 Beyond Plaintiff's short-circuiting of the meet and confer process regarding ESI
8 itself, Plaintiff's motion requests ESI searches for documents Defendants did not agree
9 to produce. This amounts to an end run around the normal process of resolving issues
10 regarding the discovery requests themselves, and an attempt to sneak into ESI searches
11 substantive matters that have not been resolved—and that are improper subjects of ESI
12 searches even if some substantive production might somehow be proper.

13 For example, Plaintiff's search numbers 34¹⁵ and 35¹⁶ request an ESI review of
14 Starz's Chief Financial Officer's files because Defendants' Initial Disclosures stated that
15 he would provide testimony on "Starz's revenue forecast process, the variance between
16 the projected and actual revenues, the connection between the projected revenue and
17 bonuses, and DIRECTV's performance." Defendants did not agree to produce this
18 information and do not believe this information will be successfully obtained through an
19 ESI document production. This is specifically-identifiable information that should be
20 obtained through a 30(b)(6) deposition or by Plaintiff propounding a discrete document
21 request for documents sufficient to show Starz's revenue or budget projection process.
22 There is no reason to search millions of documents for the words revenue or forecast.

23 Similarly, Plaintiff's proposed search number 10, requests an ESI review in
24

25 ¹⁵ Plaintiff's Request Number 34 asks for ("Revenue Forecast" OR "Revenue Budget"
26 OR "Budget Forecast" OR "Budget Projection" OR "Subscriber Projection") to be in
27 Mr. MacDonald's archives during a period of four years and two months.

28 ¹⁶ Plaintiff's Request Number 35 asks for ((DIRECTV OR DTV) AND (Revenue OR
Loss OR Project* OR Variance OR Actual OR Perform*)) to be run in Mr.
MacDonald's archives during a three year and seven month period.

1 connection with Plaintiff's document requests seeking "me-too" evidence, despite
2 Starz's objection to producing "me-too" evidence. (Carter Decl., Exh. E, RFP Nos. 38-
3 42.) In fact, in the parties' most recent correspondence on this issue, Defendants
4 requested that Plaintiff "clarify [whether] Plaintiff [is] stating that he is entitled to me-
5 too evidence regarding any complaint made to Starz Human Resources, the EEOC, or
6 the DFEH, that concerns allegations of discrimination or harassment based on race,
7 ethnicity, gender, and/or retaliation based on any reason from 2010 through present."
8 (Olney Decl., Exh. 13.) Defendants are still awaiting a response. But even if Plaintiff is
9 entitled to any "me-too evidence," any production would be through a discrete
10 production of non-privileged, responsive documents, not through an ESI review.

11 **D. Plaintiff's Requested ESI Searches Are Not Proportionate Or Designed**
12 **To Lead To Relevant Documents.**

13 Even excluding the personal electronic devices and personal email accounts of
14 employees, over which Starz has no control, the ESI searches requested by Plaintiff are
15 massive. The size of the production that Plaintiff's searches would yield is a result of
16 three factors: the date ranges of the documents, the number of custodians to be
17 searched, and the breadth of the search terms. Plaintiff's demands of a date range of
18 more than 7 years and 25 custodians yield a universe of approximately 592.75 gigabytes
19 of data and 4,698,151 emails, just including email archives (and not counting other
20 forms of stored data).¹⁷ Plaintiff seeks to conduct searches of those documents in 56
21 broad categories that search for hundreds of disjunctive criteria that would return a
22 document as a "hit," whether or not it has any relevance to this case. That type of ESI
23 search is entirely disproportionate to any legitimate interest in discovery in this single-
24 plaintiff employment action.

25 _____
26 ¹⁷ "Sixteen gigabytes translates to millions of pages of text, thousands of pictures, or
27 hundreds of videos," which the Supreme Court described as "immense storage
28 capacity." *Riley*, 134 S. Ct. at 2489. Plaintiff's requested search of 592.75 gigabytes
brings to the present the Supreme Court's expectation "that the gulf between physical
practicability and digital capacity will only continue to widen in the future." *Id.*

1 Significantly, Plaintiff’s argument is premised on his reliance on an older version
2 of the Federal Rules of Civil Procedure, which were amended to address the exact same
3 problem that Plaintiff’s motion creates: vastly overbroad and disproportionate discovery
4 under too loose a standard. Plaintiff quotes the former version of Federal Rule of Civil
5 Procedure 26—without acknowledging that it is not the current version of the Rule—as
6 stating: “Relevant information need not be admissible at the trial if the discovery
7 appears reasonably calculated to lead to the discovery of admissible evidence.” (*See*
8 *above* at p.27.) Significantly, however, that language was removed from Rule 26 in the
9 2015 amendments to the Rule.

10 The Committee Notes on Rules—2015 Amendment expressly noted that “[t]he
11 former provision for discovery of relevant but inadmissible information that appears
12 ‘reasonably calculated to lead to the discovery of admissible evidence’ is also deleted.”
13 They explain that “use of the ‘reasonably’ calculated phrase to define the scope of
14 discovery ‘might swallow any other limitation on the scope of discovery.’” Finding that
15 “[t]he ‘reasonably calculated’ phrase has continued to create problems,” the language
16 was eliminated. In short, “[t]he 2015 amendments thus eliminated the ‘reasonably
17 calculated’ phrase as a definition for the scope of permissible discovery.” *In re Bard*
18 *IVC Filters Products Liability Litigation*, 317 F.R.D. 562, 564 (D. Ariz. 2016).

19 In place of the prior rule allowing discovery of anything reasonably calculated to
20 lead to admissible evidence, Rule 26 now defines the permissible scope of discovery as
21 “nonprivileged matter that *is relevant* to any party’s claim or defense *and proportional*
22 *to the needs of the case.*” (Emphasis added.) That standard—not the one Plaintiff relies
23 on—is the one that governs resolution of this motion. *In re Bard*, 317 F.R.D. at 564
24 (“the 2015 amendment effectively abrogated cases applying a prior version of Rule
25 26(b)(1).”) And under the governing standard, Plaintiff’s expansive date ranges,
26 custodians, and search terms are simply not proportional to the needs of this single-
27 plaintiff employment dispute regarding events that occurred during the six months prior
28 to Plaintiff’s termination.

1 **1. Time Period Limitations**

2 Plaintiff proposes date ranges from January 1, 2010 through the “present”—a
3 range of more than seven years—for all but 7 of his 25 custodians. A seven-year
4 timeframe is not a reasonable starting place for discovery in this action.

5 The crux of Plaintiff’s case is that he was wrongfully terminated on October 7,
6 2014, in retaliation for “whistleblowing” that allegedly occurred beginning on April 28,
7 2014—essentially a six-month period. That means that Plaintiff wants Defendants to
8 comb through documents for a nearly five-year period before he engaged in the
9 protected activities for which he was allegedly terminated, and for a two-and-a-half-year
10 period after he was terminated. That is unreasonable and disproportional.

11 Plaintiff’s attempt to justify such a broad timeframe elucidates why his proposals
12 must be rejected. Plaintiff asserts that the Court should compel a search of all
13 documents through the present, even though he was terminated in October 2014, because
14 “any subsequent discussions involving Plaintiff’s name are likely of infrequent
15 occurrence.” Plaintiff essentially concedes that such a timeframe is unlikely to turn up
16 relevant documents. Irrelevant hits are extremely likely, however. “Thomas” isn’t just
17 Plaintiff’s name. It is one of the most common names in the country (and, indeed,
18 throughout the world). It is so common that *two* of the employees who reported directly
19 to Plaintiff are also named Thomas. Plaintiff’s assertion that emails containing the name
20 “Thomas” are likely to be infrequent is untrue.

21 Plaintiff is right, however, that, non-privileged relevant emails after October 2014
22 are likely to be “of infrequent occurrence,” if not entirely non-existent. That is precisely
23 why the timeframe must be narrower.

24 Similarly, emails with any relevance to this case before Plaintiff’s alleged
25 protected activities in April 2014 are likely to be “of infrequent occurrence.” There
26 cannot be evidence that Defendants retaliated against Plaintiff for something that
27 Plaintiff had not even done yet. But again, keyword searches through documents over a
28 five-year period before that will yield enormous numbers of “hits” to documents that

1 meet the search criteria, but have no actual or anticipated relevance to this case.

2 In short, a seven-year search timeframe is not proportional discovery for conduct
3 occurring over a mere six months. Proportionate ESI discovery in this single-plaintiff
4 employment dispute—*i.e.*, tailored to obtain the most relevant documents without
5 searching for every tangentially related document during irrelevant time periods—
6 should generally be *less than six months, not more than seven years*.

7 Accordingly, most searches should be run only during the Retaliation Period
8 (April 28, 2014-October 7, 2014). This period coincides with Plaintiff's allegation that
9 he experienced retaliation at Starz during a five-month period that began on April 28,
10 2014, after he allegedly complained about information he learned during a dinner that
11 night (the "Comcast Negotiations"), and ended on the date of his termination from Starz
12 on October 7, 2014. (*See* Carter Decl., Ex. B ¶ 17 ("Mr. Thomas achieved great
13 successes while at Starz, but that all changed after he expressed his concerns about
14 unlawful activities, refused to participate in illegal behaviors, and advocated on behalf of
15 minorities and women.); ¶ 49 ("After the April 28, May 2, and August 22, 2014
16 incidents, Mr. Thomas noticed that Mr. Thornton and other Starz executives began
17 excluding Mr. Thomas from meetings and emails."); ¶ 65 ("Shortly after whistleblowing
18 at the Palm Restaurant in April 2014, Mr. Thomas noticed that other Starz senior
19 management began treating him unfairly and began excluding him from
20 communications.")). This six-month period more than covers the crux of Plaintiff's
21 claims. Plaintiff's first allegation of "retaliation" occurred on August 4, 2014, four
22 months after the alleged "whistleblowing." (*Id.* ¶ 53.) Most if not all ESI discovery
23 should be confined to this period.

24 The following time periods are broader, but are generally over-inclusive and
25 should be used far more sparingly with respect to specific requests.

26 The Thornton Period (August 1, 2013-October 7, 2014): This period coincides
27 with Starz's promotion of Defendant Michael Thornton to Chief Revenue Officer
28 ("CRO"). When Mr. Thornton became CRO on August 13, 2016, he became Plaintiff's

1 supervisor, replacing Plaintiff's prior supervisor and close friend, Ed Huguez. Plaintiff
2 alleges that "Mr. Thornton repeatedly threatened to fire Mr. Thomas, who was largely
3 responsible for the DirecTV negotiations, if the deal was not completed" by the time the
4 prior amendment expired.

5 This time period is facially overbroad. The entire length of time that an individual
6 is a plaintiff's supervisor can—and in this case does—span a longer period than is
7 relevant. Thornton was Plaintiff's supervisor before Plaintiff allegedly engaged in
8 protected activities, and long before he allegedly retaliated against Plaintiff.
9 Nevertheless, this period is still six years narrower than Plaintiff's proposals, and could
10 be used sparingly for particular searches out of an over-abundance of caution.

11 The Post Termination Period (October 7, 2014-March 31, 2015). The period after
12 Plaintiff's termination is irrelevant to this case. What matters is what happened before
13 and up to the point of Plaintiff's termination. What happened after is irrelevant.
14 Plaintiff's request for documents during this timeframe appears to speculate that *if*
15 someone at Starz made some statement regarding Plaintiff's termination after he left,
16 that could be used as an after-the-fact admission. That kind of speculation about
17 whether employees might be gossiping about him cannot justify Plaintiff's far-reaching
18 ESI requests for two and a half years of massive numbers of documents. Defendants
19 believe that all discovery should be cut off as of Plaintiff's termination date. But if the
20 Court is inclined to permit discovery beyond that date, it should be limited to a
21 reasonable time after the termination date—three or six months. Presumably, any gossip
22 about Plaintiff would have occurred in the immediate aftermath of his termination. After
23 that, any discussions about Plaintiff are more likely to be reflective of Defendants'
24 defense of this lawsuit, and Plaintiff's attempt to obtain them is simply a backdoor into
25 Defendants' privileged legal strategy. And, more importantly, after that the search
26 results are more likely to be entirely irrelevant to this case, and only returned as hits to
27 the searches because of overbroad search criteria.

28 The Pre-Thornton Period (January 1, 2010-August 13, 2013). This time-period

1 has no relevance to this case. The crux of this single-plaintiff case is whether Thornton
2 retaliated against Plaintiff. What happened before Thornton became Plaintiff's
3 supervisor is irrelevant. Plaintiff alleges that his prior supervisors believed he was a
4 strong performer. That allegation is irrelevant. Even if Plaintiff's prior supervisors
5 liked him, that does not prove that Thornton retaliated against Plaintiff—it only proves
6 that Thornton had a different opinion. *See, e.g., Rey v. C&H Sugar Co.*, 2012 U.S. Dist.
7 LEXIS 169931, at *13 (N.D. Cal. Nov. 28, 2012) (“a previous supervisor’s good review
8 is not enough to show pretext.”), *citing Rojas v. Florida*, 285 F.3d 1339, 1343 (11th Cir.
9 2002) (“Different supervisors may impose different standards of behavior, and a new
10 supervisor may decide to enforce policies that a previous supervisor did not consider
11 important.”). Accordingly, there is no reason to search these files at all. If the Court is
12 inclined to permit any searches in this time period, however, they should be exceedingly
13 sparing, and limited to Plaintiff and senior human resources executives employed by
14 Starz during that time period, since Plaintiff has not offered any reason why anything
15 else from this long-ago time period could be relevant at all.

16 2. Custodians

17 Plaintiff proposes that the records of 25 individuals be searched. Even Plaintiff
18 apparently concedes that he cannot depose that many people in one-day depositions, yet
19 Plaintiff's proposal nevertheless seeks millions of documents from people whose
20 relationship to this case is so minor that they will not even be deposed. Worse, Plaintiff
21 includes within his demands custodians who served as attorneys for Starz, whose
22 communications and documents will routinely be protected by the attorney-client
23 privilege and attorney work product doctrine, making any search and privilege review
24 extremely burdensome and time-consuming. Again, that is disproportionate to
25 Plaintiff's legitimate interest in discovery. Proportionate ESI discovery in this single-
26 plaintiff employment dispute should be limited to *less than a dozen custodians, not more*
27 *than two dozen*. While Defendants think that 10 custodians would be more than
28 sufficient, Defendants offered to agree to 15 custodians in an attempt to resolve this

1 matter without judicial intervention.

2 Below, Defendants will address the custodians to which it agreed, and that
3 discussion should make clear that Defendants have agreed to search through mountains
4 of documents for the most relevant documents. But Defendants begin with a discussion
5 of the custodians most in dispute.

6 First, Defendants strongly object to Plaintiff's demand for an ESI search of **four**
7 **Starz attorneys**—including Starz's current and former General Counsel and subordinate
8 members of Starz's in-house legal department: Steve Beabout (*Former General*
9 *Counsel*), Todd Hoy (*Vice President, Business and Legal Affairs*), Richard Waysdorf
10 (*Former, Senior Vice President, Business and Legal Affairs*), and David Weil (*VP and*
11 *General Counsel, Business and Legal Affairs*).

12 “[T]he [attorney-client] privilege [is] ‘fundamental to its legal system’ and ‘a
13 hallmark of [its] jurisprudence.’” *Bittaker v. Woodford*, 331 F.3d 715, 721 (9th Cir.
14 2003) (quoting *People v. Superior Court (Laff)*, 25 Cal. 4th 703, 715 (2001)). The
15 attorney-client privilege “is ‘no mere peripheral evidentiary rule, but is held vital to the
16 effective administration of justice.’” *Id.* (quoting *Roberts v. City of Palmdale*, 5 Cal. 4th
17 363, 380 (1993)).

18 Starz's attorneys' communications are at the heart of the attorney-client privilege,
19 and implicate attorney work product concerns as well. Plaintiff's attempt to include four
20 Starz attorneys as custodians would require Defendants to review massive numbers of
21 documents not only for relevance, but also for privilege. And it greatly increases the
22 risk of inadvertent disclosure of privileged information. There is no justification for
23 including Starz's attorneys as custodians.

24 Plaintiff glosses over the privilege issues, and blandly asserts that he seeks to
25 include people who are or were Starz's attorneys as custodians “because, as alleged in
26 the Second Amended Complaint, they were present for or received complaints regarding
27 incidents motivating Starz's retaliation against Mr. Thomas.” In other words, Thomas
28 suspects that they may, in some limited fashion, have relevant information. That is not

1 nearly enough. “The attorney-client privilege, like all other evidentiary privileges, may
2 obstruct a party’s access to the truth.” *Admiral Ins. Co. v. United States Dist. Court*, 881
3 F.2d 1486, 1494 (9th Cir. 1989). “Although it may be inequitable that information
4 contained in privileged materials is available to only one side in a dispute, a
5 determination that communications or materials are privileged is simply a choice to
6 protect the communication and relationship against claims of competing interests.” *Id.*
7 “Any inequity in terms of access to information is the price the system pays to maintain
8 the integrity of the privilege.” *Id.*

9 If Starz’s attorneys are somehow witnesses to this case—and that is a really, really
10 big IF—then there are much less invasive ways to obtain any non-privileged information
11 they might have than an ESI search through all of their privileged communications.
12 Plaintiff can submit written discovery requests and/or elect to use some number of his
13 depositions to ask Starz’s attorneys questions that do not invade the attorney-client
14 privilege or work product doctrine. But what Plaintiff is asking for here—license to run
15 keyword searches through all of the attorney-client privileged communications of three
16 Starz attorneys over a four-year period and a fourth Starz attorney over a seven-year
17 period—is unreasonable, highly intrusive, and should be rejected by this Court.

18 Second, Thomas seeks to search through seven years’ worth of communications
19 from three individuals who are so tangentially related to this case that they are not even
20 mentioned in his Complaint: Patrick DiBartolomeo (*Senior Director Affiliate Sales*),
21 Jaime Doshier (*Senior Director Affiliate Sales*), and Shree Potts (*Former HR Manager*).

22 During Plaintiff’s employment at Starz, DiBartolomeo and Doshier were Starz
23 employees who reported to Tom Gove, who in turn reported to Plaintiff. In other words,
24 Plaintiff was their boss’ boss. Again, this case is about the termination of Plaintiff’s
25 employment by his own supervisor, Thornton, and the crux of Plaintiff’s allegations ask
26 whether Thornton terminated Plaintiff because of some nefarious reason or simply
27 because Plaintiff was a poor performer. Thornton was DiBartolomeo’s and Doshier’s
28 boss’ boss’ boss.

1 As might be expected, DiBartolomeo and Doshier have pretty limited information
2 about the actions of their boss' boss' boss. They may have some limited information
3 relevant to this case: Defendants mention them in their Initial Disclosures stating that
4 they will testify to (1) Thomas's failure to supervise his team, (2) his opposition to
5 Starz's strategy to create original programming, and (3) Thomas's unnecessary trips to
6 affiliate call centers. But these topics are far too limited to justify what Plaintiff is
7 asking for—a review of all of their communications over a seven-year period as part of
8 an exhaustive ESI search.

9 Importantly, an ESI search will already include Gove, Plaintiff, and Thornton as
10 custodians. If DiBartolomeo or Doshier had any communication with Gove (their boss),
11 Plaintiff (their boss' boss), or Thornton (their boss' boss' boss), those communications
12 will already be included in the ESI search. Likewise, if they had any communications
13 with any of the other custodians, those will be included. That should already encompass
14 their relevant communications, without including them as separate custodians. What it
15 will not include is seven years of irrelevant communications from two people involved
16 in the periphery of this case.

17 Shree Potts is similarly involved in the periphery of this case, with no justification
18 for searching seven years of her documents. During his employment, Plaintiff had a
19 relationship with Potts. There are reasons to believe that will be relevant to this case.
20 But there are no reasons to believe it would be reasonable to search through Potts'
21 communications over a seven-year period, when she is not alleged to have any other
22 involvement in the allegations of this case.

23 Third, Plaintiff seeks to include as custodians three individuals who are not even
24 listed in Defendants' Initial Disclosures as potential witnesses, and who are not even
25 plausibly witnesses to this case: Pamela Wolfe (*Executive Vice President, Human*
26 *Resources*), Mandie Litton (*Former Assistant to Michael Thornton and Keno Thomas*),
27 and Greg Maffei (*Chairman, Starz*)

28 Wolfe was hired by Starz in May 2016—more than a year and a half after

1 Plaintiff's termination. Defendants do not see any reason for an ESI review of her files,
2 considering she was not employed by Defendants during any of the events alleged in the
3 Complaint. If there are specific documents Plaintiff seeks, Plaintiff should propound a
4 Request for Production for those documents.

5 Litton served as the assistant to Plaintiff and Thornton. Litton is not alleged to
6 have been involved in or a witness to any of the acts alleged in Plaintiff's complaint.
7 Plaintiff has not provided a reason for adding her as a custodian, and Defendants do not
8 see any.

9 Maffei is the Chairman of Starz's Board of Directors, and as such his
10 communications are among the most valuable and confidential at Starz. But Maffei is
11 not a participant in or witness to any of the allegations of the complaint. Maffei is
12 referenced in the Complaint—but only as a character in a story that Plaintiff allegedly
13 heard from Thornton. Plaintiff does not allege that Maffei and Plaintiff ever interacted
14 or that Maffei took any actions against Plaintiff. Plaintiff merely alleges that Thornton
15 mentioned him. It would be like two employees at Microsoft talking about Bill Gates,
16 and then one of them demanding a review of Bill Gates's files, including his personal
17 cell phone. Being the subject of a conversation is not the same as being a participant in
18 it, and does not justify discovery from the topic of the conversation.

19 In short, there is no justification for the custodians above. Plaintiff's legitimate
20 interests in discovery will be more than satisfied by ESI searches of the custodians
21 addressed below.

22 Plaintiff Keno Thomas (*Former Senior Vice President, Sales & Affiliate*
23 *Marketing*). Plaintiff's Proposed Date Range: 1/1/10-present; Defendants' Offered Date
24 Range: 1/1/10-3/31/15. There is no real dispute on this point. Since Plaintiff's
25 employment terminated on October 7, 2014, there is little activity in his email account
26 after that date.

27 Human Resources Employees: Sheryl Anderson (*Former Executive Vice*
28 *President, Human Resources and Administration*) and David Laughlin (*Vice President,*

1 *Human Resources*). Plaintiff's Proposed Date Range: 1/1/10-present; Defendants'
2 Offered Date Range: 1/1/10-3/31/15. The most reasonable date range for these
3 custodians is the Retaliation Period, April 28, 2014-October 7, 2014. To the extent that
4 Plaintiff made complaints and was allegedly retaliated against, that period will cover
5 Plaintiff's claims. Defendants offered a five-year period, rather than a six-month period,
6 in an attempt to avoid disputes. Plaintiff's request for Human Resources searches for
7 two and a half years after his termination, however, is unreasonable.

8 Starz's C-Level Executives: Chris Albrecht (*President and CEO*), Glenn Curtis
9 (*Former President*), Defendant Michael Thornton (*Former Chief Revenue Officer*).
10 Plaintiff's Proposed Date Range: 1/1/10-present; Defendants' Offered Date Range:
11 8/1/13-3/31/15. These are burdensome searches through Starz's sensitive information.
12 Again, the most reasonable date range is the Retaliation Period. Defendants provided a
13 broad time frame for these three custodians—the entire duration of Thornton's
14 supervision of Plaintiff through Plaintiff's termination, and for six months thereafter—so
15 that Plaintiff can have full discovery into whether Mr. Thornton ever held an "animus"
16 against Plaintiff, and whether he communicated this to his supervisors (Mr. Albrecht and
17 Mr. Curtis). It also provides discovery into any assessment of Mr. Thomas's
18 performance during the Thornton Period. Additionally, it covers the allegations in the
19 Complaint regarding Plaintiff's alleged comments about the Comcast Negotiations, his
20 alleged retaliation, and his alleged refusal to engage in the 2015 budget process in or
21 about early September 2014. Finally, it will capture conversations regarding Plaintiff's
22 termination. There is no reason for any earlier time period as to these custodians (before
23 Thornton supervised Plaintiff) or for any later period (long after Plaintiff was
24 terminated).

25 Plaintiff's Former Peers: Christine Carrier (*Former Senior Vice President, Sales*
26 *& Affiliate Marketing*) and Randy McCurdy (*Former Senior Vice President, Sales &*
27 *Affiliate Marketing*). Plaintiff's Proposed Date Range: 1/1/10-present; Defendants'
28 Offered Date Range: 4/24/14-3/31/15. Plaintiff alleges that Carrier and McCurdy were

1 at the April 28, 2014 dinner where Plaintiff allegedly learned about the Comcast
2 Negotiations, and that Plaintiff expressed concern about the negotiations to McCurdy in
3 June and July of 2014. Thus, this time period starts on April 28, 2014 and ends three
4 months later. Defendants' proposed time period, however, would also capture any
5 communications regarding Carrier's and McCurdy's evaluation of Plaintiff's former
6 direct reports after Plaintiff's termination, as mentioned on Defendants' Initial
7 Disclosures. Carrier and McCurdy are, at best, witnesses to very limited aspects of this
8 case. There is no reason to search through their documents for four years before the
9 events that they allegedly witnessed, or for two and a half years after Plaintiff was
10 terminated.

11 Plaintiff's Direct Reports: Tom Gove (*Former Vice President, Sales and*
12 *Marketing*), Jennifer Schouten (*Former Vice President, Sales and Marketing*), and Tom
13 Wenzel (*Former Vice President, Sales and Marketing*). Plaintiff's Proposed Date
14 Range: Tom Gove and Tom Wenzel: 1/1/10-present; Jennifer Schouten: 8/1/13-
15 present; Defendants' Offered Date Range: 4/28/14-3/31/15. Plaintiff alleges he
16 discussed the Comcast Negotiations with his direct reports during the week of April 28,
17 2014. Thus, Defendants' proposed time period starts on April 28, 2014 and extends six
18 months past Plaintiff's termination to cover the other allegations concerning these
19 individuals. Individuals who were subordinate to Plaintiff are, at best, witnesses to very
20 limited aspects of this case. There is no reason to search through their documents for
21 four years before the events that they allegedly witnessed, or for two and a half years
22 after Plaintiff was terminated.

23 Custodians Involved in Discrete Events: These last four people discussed below
24 were identified as having, at most, limited knowledge of some tangential interest in this
25 dispute. Defendants do not believe they should be included in ESI searches at all, and
26 that they should be included in the initial list of non-custodians. In an attempt to resolve
27 this matter without judicial intervention, Defendants offered to include them all as
28 custodians—only to have Plaintiff take Defendants' compromise offer as a starting

1 position for his motion. Including them here misunderstands the nature of compromise.
2 Since Plaintiff has filed this motion, Defendants do not believe they should be included
3 at all. If they are, however, the timeframes for them should be very narrow.

4 Scott MacDonald (*Former Chief Financial Officer*). Plaintiff's Proposed Time
5 Period: 1/1/10-present; Defendants' Offered Time Period: 8/22/14-3/31/15. Plaintiff
6 alleges he made a vague comment regarding the Comcast Negotiations during an August
7 22, 2014 meeting attended by Mr. MacDonald. This time period begins at the time
8 Plaintiff allegedly made that comment and continues six months past Plaintiff's
9 termination. In light of the sensitive nature of Starz's CFO's communications and the
10 fact that he has almost no connection to this case, anything broader is unreasonable.

11 Kara Tefft (*Finance Director*). Plaintiff's Proposed Time Period: 1/1/10-present;
12 Defendants' Proposed Time Period: 8/1/14-3/31/15. Joe Zamora (*Vice President,*
13 *Finance*). Plaintiff's Proposed Time Period: 1/1/10-present; Defendants' Proposed
14 Time Period: 8/22/14-3/31/15. Plaintiff's allegations regarding Tefft begin with a
15 September 4, 2014 meeting and end with Plaintiff's termination less than two months
16 later. There is no reason to search her communications for seven years. There is even
17 less to Plaintiff's allegations regarding Zamora. He is merely identified as Tefft's
18 supervisor. Defendants do not see how that makes him a witness at all. Nevertheless, in
19 the spirit of compromise, Defendants had offered to include him for a very brief period.
20 There is no conceivable reason to search all of his communications for seven years.

21 Beth Jennewein (*Executive Director of Project Management*). Plaintiff's
22 Proposed Time Period: 6/1/14-present; Defendants' Proposed Time Period: 7/1/14-
23 8/31/14. Plaintiff alleges that he was excluded from meetings arranged by Jennewein in
24 retaliation for allegedly complaining about the Comcast Negotiation, and that he later
25 met with Jennewein to express his disagreement with the strategy his supervisor,
26 Thornton, pursued during negotiations with DIRECTV. Defendants' time period begins
27 a month before the meetings arranged by Jennewein, and ends once Starz signed an
28 amendment with DIRECTV in late August 2014, since at that point, Jennewein's

1 involvement in the alleged events terminated.

2 **3. Search Terms**

3 Defendants firmly believe it is premature for the Court to issue an order on search
4 terms. Any evaluation of search terms must be made with consideration of the
5 responsiveness rate of a search term through testing those terms in the data set (as
6 defined by custodians and time periods). Because the parties could not even agree on
7 custodians and date ranges, the parties have had no opportunity to discuss the substance
8 of search terms with the benefit of actual information regarding testing and review. The
9 Court should not issue an order on search terms until terms have been tested and revised
10 to ensure any document review will be focused on documents likely to be responsive.
11 And even then, documents should be produced before a Court issues an order that
12 additional documents must be compelled.

13 Accordingly, Defendants ask that the Court issue an order regarding custodians
14 and time frames only—and order the parties to meet and confer on search terms after
15 Defendants have had time to test the terms in the data set. *Romo v. GMRI, Inc.*, No.
16 EDCV-12-0715-JLQ, 2013 WL 11310656, at *6 (C.D. Cal. Jan. 25, 2013) (“The court's
17 role does not include the design of legally sufficient electronic keyword searches. That
18 is for the parties without taking up the court's time.”); *see also* *L-3 Commc'ns Corp. v.*
19 *Sparton Corp.*, 313 F.R.D. 661, 667 (M.D. Fla. 2015) (citing *The Sedona Conference*
20 *Best Practices Commentary on the Use of Search and Information Retrieval Methods in*
21 *E-Discovery August 2007 Public Comment Version*, 8 Sedona Conf. J. 189, 193 (2007)
22 (“The party responsible for production . . . will be ‘best situated to evaluate the
23 procedures, methodologies, and technologies appropriate for . . . producing their own
24 electronically stored information.’”).

25 In the event that the Court is inclined to exhaustively consider the proposals
26 search term by search term—which it should not—Defendants have submitted a
27 comprehensive proposals for limiting Plaintiff’s searches to weed out obvious problems
28 with them. Since Defendants firmly believe the Court should not engage in that

1 exercise, Defendants have refrained from further lengthening this monstrous brief by
2 discussing it all here, and instead refer to Exhibit M to the Declaration of Margaret
3 Carter for Defendants' specific suggestions.

4 It is enough to say here that there is a wide and obvious disparity between
5 Plaintiff's description of what he was trying to achieve and the actual search terms that
6 he proffers. For example, thirty-six of Plaintiff's requests (1, 2, 3, 4, 6, 7, 8, 9, 13, 16,
7 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 37, 38, 40, 44, 45, 46, 47, 48, 49,
8 51, 52, 56) search for communications containing the word "Thomas." Not just those
9 that refer to "Keno Thomas," but those that contain the word "Thomas." In other words,
10 if an email discusses another employee with the first (or last) name Thomas, if anyone
11 named Thomas was a party to the email, or if the email discusses any Thomas in any
12 way, shape, or form, it will be pulled into the set of documents to be reviewed. This
13 plays out in a problematic fashion with Plaintiff's other search terms. For example:

14 Plaintiff's Search Number 9 requests that Starz run in the archives of ten
15 custodians during a seven year time period "(Keno OR Thomas OR "Keno Thomas" OR
16 "Keno V. Thomas" OR "Thomas, Keno" OR (Keno w/2 Thomas) OR KVT OR
17 Keno.Thomas) AND (Divers* OR Race OR Minorit* OR Black OR (African AND
18 American) OR Gender OR Women OR Hire OR Recruit OR Promote OR Consolidat*
19 OR LIFO OR "Last In First Out")" for the purpose of—"ESI related to *Plaintiff's*
20 *advocacy* on behalf of women and minorities"—and includes custodians "*with whom he*
21 *discussed* his efforts to increase diversity at Starz through hiring practices." However, if
22 Plaintiff seeks Plaintiff's communications with others on this topic, those documents
23 will be in Plaintiff's files—there is no need to search nine other custodians for every
24 communication they may have had that touched upon those subjects. Furthermore, the
25 search does not seek to capture documents that concern Plaintiff's discussions regarding
26 the hiring, recruiting, or promotion of diverse individuals but, as drafted, seeks any
27 communication that contains the name "Thomas" and that also mentions the word or any
28 deviation of the word "hire" OR "recruit" OR "promote" OR "gender" OR "women" OR

1 “black” and so on regardless whether the email concerned Plaintiff’s alleged advocacy.
2 For example, the search would capture an email wherein an employee named Thomas
3 talks about Encore *Black*, one of Starz’s channels; a mass email stating that Starz
4 recently *hired* a new account executive; or an email asking for the *consolidated*
5 financials. Plaintiff’s search is far too broad to for its asserted purpose.

6 Plaintiff’s Search Number 3 requests that Defendants search the archives of six
7 custodians during a period of three years and seven months using the following terms
8 “(Keno OR Thomas OR “Keno Thomas” OR “Keno V. Thomas” OR “Thomas, Keno”
9 OR KVT OR Keno.Thomas) AND ((Advoca* OR Divers* OR Race OR Minorit* OR
10 Black OR African-American OR Gender OR Women) OR Skill* OR Ability OR
11 Capacity OR Perform* OR Competence OR (Violat* AND (Polic* OR Procedure*)) OR
12 “Call Center” OR “Call Centers” OR Travel OR Affair OR (Relationship AND
13 (Personal OR Sexual OR Romantic OR Inappropriate)) OR Original* OR (Leadership
14 AND Diversi*) OR Supervis* OR Manag*).” Plaintiff’s rationale for this search is two-
15 fold (1) “ESI related to Plaintiff’s advocacy on behalf of women and minorities” and (2)
16 “ESI related to purported reasons Defendants assert were responsible for his
17 termination.” (supra, p. 11-12.) Plaintiff’s first reason for this search is the same as
18 Plaintiff’s reasoning for search number 9, making this part of the search is duplicative.
19 Moreover, Plaintiff’s second reason fails to support his broad search terms. This search
20 is designed to capture documents unrelated to the parties’ claims and defenses including
21 documents that contain Plaintiff’s name (or anyone named Thomas) and the word, or a
22 deviation of the word, “affair,” “travel,” “original,” or “manage,” and so on, including a
23 mass email discussing Starz’s senior *management*, Starz’s new *travel* show, or
24 requesting the *original* file. Again, Plaintiff’s search terms are overbroad.

25 Plaintiff’s Search Number 40 would require Starz to run Plaintiff’s name during a
26 seven year period unattached to any limiter in the archives of Shree Potts, a former
27 human resources manager. As drafted, this search will pull every document in a 7-year
28 period sent between Plaintiff and Ms. Potts or sent between Ms. Potts and anyone else

1 that mentions Plaintiff or anyone named “Thomas,” including any non-employee friends
2 she may have named Thomas. While Plaintiff has not provided a rationale for this
3 search, Defendants assume it is because they stated in their Initial Disclosures that Ms.
4 Potts will testify about “Thomas’s workplace affairs.” It is unlikely that an email exists
5 confirming Thomas’s workplace affairs, and even if it did, how would finding that email
6 help Plaintiff prove his case. Thus, this search is designed not only to result in an
7 absorbent number of emails but is designed to capture more, if not all, non-responsive
8 documents.

9 Starz can continue to discuss Plaintiff’s searches in the abstract but does not
10 believe that discussion would be beneficial to the parties’ goals—identifying a
11 reasonable universe of documents for Defendants to review based on reasonable
12 custodians, time frames, and search terms that have been tested within the files of the
13 agreed upon custodians and time frames. *Romero v. Allstate Ins. Co.*, 271 F.R.D. 96,
14 109 (E.D. Pa. 2010) (Thomas Y. Allman, *Conducting E-Discovery After the*
15 *Amendments: The Second Wave*, 10 Sedona Conf. J. 215, 217 (2009)) (“Among the
16 items about which the court expects counsel to ‘reach practical agreement’ without the
17 court having to micro-manage e-discovery are ‘search terms, date ranges, key players
18 and the like.’”). The better the parties are able to identify custodians, time frames, and
19 search terms likely to lead to non-privileged, responsive documents, the more efficiently
20 Defendants will be able to review and produce those documents. Thus, Defendants ask
21 the Court to deny Plaintiff’s search term proposal to permit Defendants the time to
22 properly test and structure searches that will result in the documents Plaintiff seeks. *See*
23 *The (2004) Sedona Principles: Best Practices, Recommendations & Principles for*
24 *Addressing Electronic Document Production the Sedona Conference Working Group on*
25 *Electronic Document Retention and Production*, 5 Sedona Conf. J. 151, 180 (2004)
26 (“When responding to discovery requests, organizations should define the scope of the
27 data needed to appropriately and fairly address the issues in the case and to avoid
28 unreasonable overbreadth, burden, and cost [including] collecting data from repositories

1 used by key players rather than generally searching through the entire corporate
2 computer system; defining the set of data to be collected by applying reasonable
3 selection criteria, including search terms, date restrictions, or folder designations; and
4 avoiding collection efforts that are out of proportion to or are inappropriate in the
5 context of a particular litigation.”).

6 **CONCLUSIONS**

7 **I. Plaintiff’s Conclusion**

8 For the foregoing reasons, Plaintiff requests a Court order (1) requiring
9 Defendants to perform each of the ESI searches set forth above, and produce all
10 responsive non-privileged emails seriatim, completing production no later than April 18,
11 2017; (2) stating that Defendants must search custodians’ personal devices if it is
12 determined that the custodian may be dismissed without cause, and uses the personal
13 device for work-related purposes; and (3) modifying the stipulated protective order filed
14 on February 27, 2017, to omit the “Highly Confidential” designation.

15 **II. Defendants’ Conclusion**

16 Defendants respectfully request that the Court (1) deny Plaintiff’s request for a
17 modification of the protective order, and leave in place the standard two-tier protective
18 order that has been entered in this case; (2) reject Plaintiff’s request for an order seizing
19 the personal devices (*e.g.*, iPhones) and email accounts of Starz’s current or former
20 employees, which Defendants have no legal right to seize, and hold that if Plaintiff
21 wishes to take discovery from these individuals, he must do so directly by serving them
22 with subpoenas to which they have an opportunity to object on privacy grounds; and
23 (3) permit discovery to proceed in a reasonable and good faith fashion by denying
24 Plaintiff’s request for any order compelling production of any specific discovery at this
25 time, with the understanding that Starz will test search terms across more than a million
26 documents, review the results to ensure the searches are designed to pull more
27 responsive than non-responsive documents, and once it has tested and verified its search
28 terms, it will run those terms, review the documents, and produce non-privileged

1 responsive documents. At that point, the parties can use that production to meet and
2 confer regarding whether additional ESI searches are necessary.

3
4 Dated: March 13, 2017

Respectfully Submitted,
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17 **I hereby attest that all other signatories listed, and on whose behalf the filing is**
18 **submitted, concur in the filing's content and have authorized the filing.**
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